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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 60

JAMES RUSSELL ROBINSON, ET AL.,
APPELLANTS,

vs.

FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED JANUARY 16, 1963
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SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN THE CRIMINAL COURT OF RECORD, OF DADE COUNTY, IN AND FOR DADE COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA,

vs.

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LAUE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, DR. CARL ELLIOTT YEAGER, JR.

INFORMATION FOR UNLAWFULLY REMAINING IN A RESTAURANT AFTER HAVING BEEN REQUESTED TO LEAVE—Filed August 19, 1960

In the Name and by Authority of the State of Florida:

John C. Wynn, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, in and for Dade County, prosecuting for the State of Florida, in the said County, under oath, information makes that James Russell Robinson, Joseph Price Perkins, Marvin Edison Robinson, Thomas Vawn Roland, James H. Laue, Thomas Walter Gaither, Barry M. Cohen, Angeline E. Butler, Henry Pringle, Bernard Lafayette, Oliver William St. Pee, Leon Everette Bailey, Dorothy R. Miller, Patricia Stephens, Pricilla Stephens, Alice M. Parham, Robert Paul Young, Dr. Carl Elliot Yeager, Jr. of the County of Dade and State of Florida, on the 17th day of August, in the year of our Lord, one thousand nine hundred and sixty, in the County and State aforesaid, did then and there unlawfully remain or [fol. 4] attempt to remain in a restaurant after being requested to depart therefrom in violation of Section 509:141

(3), Florida Statute, in that the above-named defendants at the aforesaid time and place did then enter the premises located at 5941 Northwest 7th Avenue, in the County and State aforesaid, said premises being then and there owned and operated by Shell City, Inc., a Florida Corporation, and which said premises were then and there being operated as a restaurant under the name Shell City Restaurant; that the above-named defendants did then and there seat themselves as guests at tables in the aforesaid restaurant; and that said above-named defendants did then and there unlawfully remain or attempt to remain in the aforesaid restaurant after said above-named defendants had been requested to depart therefrom by the manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant, said manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant being then and there of the opinion that if the above-named defendants were entertained or served it would be detrimental to the said restaurant, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

John C. Wynn, Assistant State Attorney, Eleventh Judicial Circuit of Florida, in and for Dade County.

State of Florida,
County of Dade:

Personally appeared before me, John C. Wynn, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, [fol. 5] in and for Dade County, who, being first duly sworn, says that the allegations as set forth in the foregoing Information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged.

John C. Wynn, Assistant State Attorney, Eleventh Judicial Circuit of Florida, in and for Dade County.

Sworn to and subscribed before me this 18th day of August, A. D. 1960.

J. F. McCracken, Clerk of the Criminal Court of Record, Dade County, Florida, By Jean Williams, Deputy Clerk.

[fol. 7]

IN THE CRIMINAL COURT OF DADE COUNTY

[Title omitted]

ARRAIGNMENT, PLEAS OF NOT GUILTY AND WAIVERS OF JURY TRIAL—August 22, 1960

The Defendants, James Russell Robinson, Joseph Price Perkins, Marvin Edison Robinson, Thomas Vawn Roland, James H. Lane, Thomas Walter Gither, Barry M. Cohen, Angeline E. Butler, Henry Pringle, Bernard Lafayette, Oliver William St. Pee, Leon Everette Bailey, Dorothy R. Miller, Patricia Stephens, Pricilla Stephens, Alice M. Parham, Robert Paul Young, and Dr. Carl Elliott Yeager, Jr., were arraigned in open Court by Aram P. Goshgarian, Assistant State Attorney, and each pleaded not guilty, waiving trial by jury.

[fol. 8]

IN THE CRIMINAL COURT OF DADE COUNTY

[Title omitted]

CLERK'S MINUTES OF TRIAL—August 26, 1960

Irwin J. Block and Aram P. Goshgarian, Assistant State Attorneys.

H. W. Dixon, Marvin Rossman, Tobias Simon and Robert J. Raymon, Counsel for the Defense.

Reported by Pama Kane.

The Court, upon the oral Motion of Irwin J. Block, Assistant State Attorney, ordered the Information amended

to change the names of the Defendants, James H. Lane and Thomas Walter Gither, wherever appearing therein to "James H. Laue and Thomas Walter Gaither".

All the witnesses were sworn and the Rule was invoked, at the request of Counsel for the Defense.

Sherian Rose Jeffery, Edward S. Hollander, George J. McKelvey, Warren C. Williams and John P. Suggs testified before the Court.

[fol. 9] Counsel for the Defense orally presented a Motion for a Directed Verdict, which Motion the Court denied.

The Court placed the Defendant, James Russell Robinson, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

The Court placed the Defendant, Joseph Price Perkins, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for period of one (1) year.

The Court placed the Defendant, Marvin Edison Robinson, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

The Court placed the Defendant, Thomas Vawn Roland, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

The Court placed the Defendant, James H. Laue, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

[fol. 10] Order Releasing Cash Bond of Defendant, James H. Laue—

The Court placed the Defendant, Thomas Walter Gaither, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

The Court placed the Defendant, Barry M. Cohen, on probation, without adjudication and ordered him released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Barry M. Cohen—

The Court placed the Defendant, Angeline E. Butler, on probation, without adjudication, and ordered her released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Angeline E. Butler—

[fol. 11] The Court placed the Defendant, Henry Pringle, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Henry Pringle—

The Court placed the Defendant, Bernard Lafayette, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

The Court placed the Defendant, Oliver William St. Pee, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Oliver William St. Pee—

The Court placed the Defendant, Leon Everett Bailey, on probation, without adjudication, and ordered him released [fol. 12] into the custody of the Probation Officer for a period of one (1) year.

The Court placed the Defendant, Dorothy R. Miller, on probation, without adjudication, and ordered her released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Dorothy R. Miller—

The Court placed the Defendant, Patricia Stephens, on probation, without adjudication, and ordered her released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Patricia Stephens—

The Court placed the Defendant, Pricilla Stephens, on probation, without adjudication, and ordered her released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Pricilla Stephens—

[fol. 13] The Court placed the Defendant, Alice M. Parham, on probation, without adjudication, and ordered her released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Alice M. Parham—

The Court placed the Defendant, Robert Paul Young, on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Robert Paul Young—

The Court placed the Defendant, Dr. Carl Elliott Yeager, Jr., on probation, without adjudication, and ordered him released into the custody of the Probation Officer for a period of one (1) year.

Order Releasing Cash Bond of Defendant, Dr. Carl Elliott Yeager, Jr.—

[fol. 14]

IN THE CRIMINAL COURT OF RECORD

IN AND FOR DADE COUNTY, FLORIDA

No. 60-5173-A

[Title omitted]

ORDER GRANTING PROBATION TO JAMES RUSSELL ROBINSON —August 26, 1960

It Appearing Unto the Court that the defendant, James Russell Robinson has been found guilty of the charge of Unlawfully Remaining in a Restaurant after having been Requested to Leave by the Court upon a trial without a jury and it appearing unto the Court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, and the Court being fully advised in the premises, it is thereupon

Considered, Ordered, and Adjudged that an adjudication of guilt and the imposition of sentence be, and the same are hereby, stayed and withheld and the defendant, James Russell Robinson is hereby placed on probation in the custody of the Probation Officer of the Court for a term of one (1) year.

Done and Ordered in open Court at Miami, Dade County, Florida this the 26 day of August A.D., 1960.

George E. Schulz, Judge.

[fol. 15]

IN THE CRIMINAL COURT OF DADE COUNTY

CLERK'S RECITATION OF ENTRY OF ORDERS GRANTING PROBATION—August 26, 1960

And on August 26, 1960, the Court entered herein its Order Granting Probation, as to each of the Defendants, Joseph Price Perkins, Marvin Edison Robinson, Thomas Yawn Roland, James [illegible] Laue, Thomas Walter Gaither, Barry M. Cohen, Angeline E. Butler, Henry Pringle, Bernard Lafayette, Oliver William St. Pee, Leon Everette Bailey, Dorothy R. Miller, Patricia Stephens, Pricilla Stephens, Alice M. Parham, Robert Paul Young, and Dr. Carl Elliott Yeager, Jr., which said Orders Granting Probation were duly recorded by the Clerk of the Court in Criminal Court of Record Minute Book No. 25, on Pages 3, 4, 5, 6, 8, 9, 11, 13, 15, 16, 18, 19, 21, 23, 25, 27, and 29, respectively, and are in the same words and figures as the Order Granting Probation as to the Defendant, James Russell Robinson, hereinabove set forth, except for the name of the respective individual defendant and the letter following the case number, designating the docket page.

* * * * * *

(And on September 21, 1960, the Defendants filed herein their Notice of Appeal, which said Notice of Appeal was duly recorded by the Clerk of the Court in Criminal Court of Record Minute Book No. 26, on Page 339, and is in the words and figures following, to-wit:)

IN THE CRIMINAL COURT OF RECORD

IN AND FOR DADE COUNTY, FLORIDA

No. 60C 5173

[fol. 17]

IN THE CRIMINAL COURT OF RECORD

IN AND FOR DADE COUNTY, FLORIDA

No. 60C 5173

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 21, 1960

[fol. 18] The Defendants assign the following as errors to be relied upon in the appeal in the captioned cause.

1. The Court erred in finding the Defendants guilty and entering judgment against the Defendants for the reason that it affirmatively appears that Shell City, Inc., has requested the Defendants to leave its premises solely because of their color or associations with persons of color, and that the subsequent arrest of the Defendants and the trial of the Defendants pursuant to Florida Statutes 509.141(3) constituted state aid and assistance in support of private discrimination based solely upon color or associations with persons of color whereby the entry of said judgment violated the Defendants' rights to due process of law, their rights to equal protection of the laws, and their privileges and immunities, as guaranteed them by the Fourteenth Amendment to the Federal Constitution and further violated their privileges and immunities of federal citizenship as guaranteed by Article IV, Section 2, of the Federal Constitution.

Tobias Simon, Howard Dixon, Robert Ramer, Marvin Rosman, Attorneys for Defendants, c/o Florida Civil Liberties Union, 706 Ainsley Building, Miami, Florida.

[fol. 21]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 60C 5173

THE STATE OF FLORIDA, Plaintiff,

vs.

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETT BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM; ROBERT PAUL YOUNG, DR. CARL ELLIOTT YEAGER, JR., Defendants.

Dade County Court House, Miami, Florida, Friday, 9:30 a.m., August 26, 1960.

The above-entitled case came on for trial before the Hon. George E. Schulz, Judge.

Reporter's Transcript of Testimony

APPEARANCES:

Richard E. Gerstein, State Attorney, by Irwin J. Block, Assistant State Attorney, and Aram P. Goshgarian, Assistant State Attorney.

Tobias Simon, Esq., Howard W. Dixon, Esq., Robert Ramer, Esq., and Marvin Rosman, Esq., Attorneys for Defendants.

[fol. 23] The Court: We will invoke the rule.

[Whereupon, all witnesses were duly sworn and admonished by the Court and retired from the courtroom.]

Mr. Block: At this time the State wishes to amend the information as to defendant F to read Gaither instead of Gither, and as defendant E to read Laue instead of Lane.

The Court: Is there any objection on the part of the defendants?

Mr. Dixon: None.

The Court: The motion to amend the information is hereby granted.

Is the State ready to proceed?

Mr. Block: Yes.

The Court: If any of the defendants cannot hear the witnesses testify, if they will let the Court know, we will see that they are able to hear.

Thereupon: SHARON ROSE JEFFERY was called as a witness on behalf of the State and, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Block:

Q. Tell the Court your full name.

A. Sharon Rose Jeffery.

[fol. 24] Q. What is your home address?

A. 10045 Greenfield, Detroit, Michigan.

Q. What are you residing here in Miami?

A. The Sir John Hotel.

Q. What is that located? Is that in the downtown colored area of Miami?

Mr. Ramer: To which we object. The question is not relative to any of the issues presented here.

The Court: Sustained.

Q. When did you arrive in Miami?

A. August 13.

Q. Were you in Shell's City restaurant on Wednesday, August 17, of this year?

A. Yes, I was.

Q. Approximately what time did you arrive there?

A. Between four-fifteen and four-thirty.

Q. Sharon, while you were in the restaurant, did you observe a group of eighteen people—white and colored—that proceeded into the restaurant?

A. Proceeded?

Q. That were in the restaurant.

A. Yes.

Q. Were they there before you or were you there before they came in?

[fol. 25] A. Before me.

Q. Do you know those eighteen people?

A. Yes.

Q. Would you look around, please, and as you see them, point them out and name them for the Court?

A. Leon Bailey [indicating].

Mr. Block: Leon, would you raise your hand as your name is called.

The Witness: Bernard Lafayette, Tom Gaither, Marvin Robinson, Joe Perkins, Tom Roland, James Robinson, Robert Young, Alice Parham, Dr. Yeager.

Q. Do you know Dr. Yeager's first name?

A. No, I don't.

Q. Proceed.

A. Pricilla Stephens, Dorothy Miller, Jim Laue, Angeline Butler, Barry Cohen, Pricilla—Pat Stephens, Henry Pringle, and Oliver St. Pee.

Q. Were you there when the police arrived?

A. Yes.

Q. Are these the eighteen people who were placed under arrest by the police?

A. Yes.

Mr. Block: You may inquire.

Mr. Ramer: No questions.

[fol. 26] The Court: You are not to discuss your testimony with any of the other witnesses.

[Whereupon, the witness was excused.]

Thereupon: Edward S. Hollander was called as a witness on behalf of the State and, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Block:

Q. Were you sworn before, Mr. Hollander?

A. Yes.

Q. Will you state your name for the record?

A. Edward Sidney Hollander.

Q. What is your address?

A. 12501 Baltimore Road, Baltimore, Maryland.

Q. Where do you reside locally?

A. The Sir John Hotel.

Q. You were in Shell's City restaurant on Wednesday, August 17 of this year?

A. I was.

Q. Did you have occasion to observe eighteen people in a mixed group who were looking for service there that afternoon?

A. Yes.

Q. Do you see them here and if you do, would you name [fol. 27] them?

A. Jim Robinson, Tom Roland, Joe Perkins, Marvin Robinson, Leon Bailey, Carl Yeager, Dorothy Miller, Bernard Lafayette, Pricilla Stephens, Angeline Butler, Barry Cohen, Patricia Stephens, Henry Pringle, Oliver St. Pee—if that is eighteen.

Q. Do you know these two seated here [indicating]?

A. Yes.

Q. Would you name them?

A. Bob Young and Alice Parham.

Mr. Block: This witness and the prior witness have named and identified the defendants in this case.

Q. Were you there when these people were arrested?

A. I was there when some of them were let out of the restaurant and I was watching when some of them were taken away.

Q. Were the ones who were taken away, the group you just named?

A. Yes.

Mr. Block: You may inquire.

Cross examination.

By Mr. Ramer:

Q. Mr. Hollander, were you present when these people entered the premises at Shell's?

A. No.

Q. How long after they entered, if you know, did you [fol. 28] arrive on the scene?

A. Oh, five or ten minutes.

Q. How long did you stay and observe these people before they were led out?

A. Well, I didn't observe them. Sometimes I was in the vicinity of the restaurant. Sometimes I was walking around the store, sometimes outside of the store.

Q. Do you know how long the defendants were present in Shell's restaurant?

A. For about an hour and a half.

Q. Can you describe to the Court what their demeanor was during that hour and a half?

Mr. Block: To which the State objects. This goes beyond the direct examination, which was solely for identification.

The Court: Is there any argument on behalf of the defendants?

Mr. Ramer: No, Your Honor.

The Court: The objection is sustained.

Mr. Ramer: I have no further questions.

[Whereupon, the witness was excused.]

Thereupon: GEORGE J. MCKELVEY was called as a witness on behalf of the State and, having been duly sworn, was [fol. 29] examined and testified as follows:

Direct examination.

By Mr. Goshgarian:

Q. Will you please state your name and address?

A. George J. McKelvey, 460 Sabal Palm Road, Miami, Florida.

Q. Where are you employed?

A. Shell's City.

Q. How long have you been in Dade County, Florida?

A. Twenty-one years.

Q. How long have you been employed by Shell's City?

A. Twenty-one years.

Q. What are your specific duties there at Shell's City?

Mr. Simon: To which we object. This is not the proper way of proving an agency relationship.

The Court: The objection is overruled.

Q. What specific duties do you have there?
A. Vice president, general manager.
Q. Is Shell's City a Florida corporation?
A. Yes, sir.
Q. When was it incorporated?
A. I am not sure, sir.
Q. Are you a member of that corporation?
A. Yes, sir.
Q. What is your position?
[fol. 30] A. Vice president.
Q. How long have you held the position of vice president?
A. Ten years.
Q. Is it a corporation in good standing at the present time, sir?
A. Yes, sir.
Q. Were you so employed on the 17th day of August, 1960?
A. Yes, sir.
Q. What general duties did you have on that date?
A. Managing of the whole store.
Q. What time did you go to work on the 17th day of August, 1960?
A. Approximately 9:00 a.m.
Q. What time did you leave the premises?
A. Approximately 9:00 p.m.
Q. Did you have occasion to be in the store at approximately four-thirty to five o'clock on the 17th of August, 1960?
A. I was.
Q. Did you have occasion to be in the vicinity of the restaurant at that time?
A. I was.
Q. Describe this restaurant to His Honor, Judge Schulz.
A. The restaurant is located at the southeast corner of the main building. It is enclosed with glass.
[fol. 31] Q. Who runs this restaurant?
A. I do.
Q. Is it leased out to anybody—sublet out to anybody?
A. No, sir.

Q. It is run by Shell's City, Inc.; is that correct?

A. That is correct.

Q. Were you present between four-thirty and five o'clock on the 17th day of August, 1960?

A. I was.

Q. Did you have occasion to observe customers that went into the establishment on that date?

A. I did.

Q. Tell the Court what you observed.

A. I observed a group of colored and white people go into the restaurant.

Q. Approximately how many did you observe?

A. Nineteen.

Q. What time of the day was this?

A. Approximately five o'clock.

Q. What happened immediately after you observed them over in the restaurant?

A. I went in and sat down at a table with three other men and ordered a cup of coffee.

Q. Who were these men?

[fol. 32] A. One was Toby Haytock.

Q. What is his position in the store?

A. He is a grocery manager.

Q. Who else?

A. The other two were salesmen. I don't know their names.

Q. You ordered coffee; is that correct?

A. That's correct.

Q. Did you observe this group who had proceeded into the restaurant?

A. I did.

Q. Where did they seat themselves?

A. At tables, in the main part of the floor.

Q. How many tables did they occupy?

A. Five tables.

Q. How were they seated, do you remember, sir?

A. There were four tables of four and one table of three.

Q. Was this a mixed crowd?

A. Yes.

Q. Both colored and white?

A. Yes, sir.

Q. How long did you observe them?

A. About a half an hour.

Q. During the course of this half hour, did any of the members of this group come up and talk to you?

[fol. 33] A. Yes, sir.

Q. Would you point them out to the Court?

A. Right here [indicating].

The Court: Which one?

The Witness: The third one.

The Court: What is his name?

The Witness: Joseph Perkins.

Q. How long after you seated yourself did the defendant, Joseph Perkins, come up and talk to you?

A. Approximately thirty minutes.

Q. What did he say to you and what did you say to him?

A. He told me he had not been served and asked me when he was going to be served.

Q. What did you say to that?

A. I told him he was not going to be served.

Q. What did the defendant do after that?

A. He asked to talk to me further. I stated I had nothing further to discuss with him.

Q. What did he do after that, sir?

A. He thanked me and went back to the table he was sitting at.

Q. What did you do after that, if anything?

A. I went outside the restaurant and talked to Mr. Williams, who is also a vice president of the company, and went [fol. 34] to the office and called the police department.

Mr. Ramer: To which we object. There are two parties who called the police.

The Court: Are you the one who made the call?

The Witness: I was.

Q. Did you return to the restaurant after you made the call?

A. I did.

Q. How soon after you made the call did the police arrive?

A. About ten or twelve minutes.

Q. Approximately what time did they arrive, Mr. McKelvey?

A. Somewhere between—I don't know exactly. Fifteen, or a quarter of or sixteen.

Q. What was the name of the officer who arrived at the scene?

A. Sergeant Suggs.

Q. What did you do upon his arrival?

A. I went back to the restaurant and went to each individual table where these people were sitting.

Q. Why did you do that?

A. I wanted to state to them they were not going to be served and request them to leave.

Q. Were you advised to do that?

A. I was advised by Sergeant Suggs that I would have to [fol. 35] repeat that in his presence.

The Court: Were the defendants present during this conversation?

The Witness: No, sir.

The Court: The conversation of the witness with Sergeant Suggs will be stricken.

Q. What did you do, exactly?

A. I went to each individual table and told them we were not going to serve them and we requested that they leave.

Q. Who was with you when you said that?

A. Sergeant Suggs was directly behind me and Mr. Gordon Williams.

Q. Tell the Court exactly what procedure you followed. Did you go to the first table?

A. I did.

Q. You told the individuals at that table separately that they were not going to be served?

A. I told them as a group of four.

Q. What did you do after that?

A. I went to the second table and repeated it; the third table, the fourth table and the fifth table right around the room.

Q. Was there any conversation with them when you told them you would not serve them?

[fol. 36] A. One of them attempted to enter into a conversation; yes, sir.

Q. Do you see him in court?

A. Right here [indicating].

Mr. Block: For the record, the witness is pointing to James Russell Robinson.

Q. What did he say to you and what did you say to him?

A. He asked me why and I told him I had nothing further to state.

Q. Why did you refuse to serve these defendants?

A. Because I feel, definitely, it is very detrimental to our business to do so.

Q. What do you mean "detrimental"?

A. Detrimental because it would mean a loss of business to us to serve mixed groups.

Q. Do you base that on any previous activities or instances that you have had in your restaurant?

A. I do.

Q. Will you tell the Court when and where these incidents occurred?

A. Approximately a month prior, we had a group of four colored people come in our restaurant and we had a tremendous amount of statements from our customers that they would quit trading at our store.

[fol. 37] Mr. Ramer: I object to statements by unidentified persons where we have no way of checking.

Mr. Goshgarian: The statute requires that an owner or manager or employee of a restaurant has a right, if he was of the opinion that serving these people would be a detriment to his business, to not serve them. I asked if he felt it was and he stated it was. Then, I have to ask what he has based his opinion upon.

The Court: Do not relate any conversation. I think it would be permissible to tell what his opinion is based upon.

The objection is overruled.

Go ahead.

The Witness: The day before this incident, we had a mixed group of four come into the restaurant. I had a number of our employees who were very hostile about it, as well as our customers. They definitely did not want it.

Q. You base your opinion on this; is that correct?

A. That is correct.

Q. Were you present when the officers arrested the eighteen defendants?

A. I was.

Q. Are you able to identify the defendants other than those you have already identified, sir?

A. Yes, sir.

[fol. 38] Q. Would you look around the court and point to the persons you observed in your store on the 17th of August, 1960?

A. The groups on both sides of the room.

Q. Would you step down from the witness stand and point to each and every one?

Mr. Ramer: We will concede he can identify them.

The Court: You stipulate that he can identify these defendants?

Mr. Ramer: Yes.

The Court: Let the stipulation be reflected in the record.

Q. Is your store located in Dade County, Florida?

A. Yes.

Q. All this happened in Dade County, Florida?

A. It did.

Q. Reverting back to the time you were seated at the counter having coffee, were you approached by any customer in the store at that time, sir?

A. I was.

Q. How far away from the defendants were you seated, sir, when this customer approached you?

A. One table away.

Q. Did the customer have conversation with you at that time?

[fol. 39] A. That is correct.

Q. Please tell the Court what this customer told you.

Mr. Ramer: To which we object. It would be hearsay.

Mr. Goshgarian: It is part of the res gestae. We are prepared to show that this customer made a remark that would show there was a hostile situation existing at that time and that it was a detriment—

The Court: I think there is a question of whether or not the defendants could have heard the remark. I am going to sustain the objection.

Q. Where is Shell's City, Inc., located?

A. Northwest Seventh Avenue and 58th Street.

Q. In Dade County, Florida, sir?
A. Correct.

Mr. Goshgarian: I have no further questions.
The Court: You may cross examine.

Cross examination.

By Mr. Ramer:

Q. Sir, when, for the first time, did you form the opinion that these people seated in your restaurant were detrimental to your business?
A. A year ago.
Q. You testified that there were four people, consisting of a mixed group, who were in your store on a previous day; [fol. 40] is that correct?
A. That's correct.
Q. You made no protest to the police on that occasion?
A. That is correct.
Q. You did not request those four people to leave?
A. That is correct.
Q. You did not tell those four people they would not be served?
A. That is correct.
Q. On, August 17, you sat in the same restaurant with this large group of people and you did nothing for approximately an hour; is that correct?
A. No, sir.
Q. What did you do toward getting these people off of your premises?
A. Approximately a half an hour after they had been in the restaurant, when one boy approached me and I told him at that time they would not be served.
Q. That was the extent of your conversation with him the first time?
A. That is correct.
Q. Then, they returned to their seats and there was no further conversation between you for approximately a half an hour?
[fol. 41] A. Fifteen or twenty minutes, I would say.
Q. In that interval, you did absolutely nothing to overcome this detriment to your business?

A. That is correct.

Q. You still hold the opinion that this was detrimental to your business, do you not?

A. Yes, sir.

Q. The basis of that opinion, of course, is the fact that certain of these prospective customers are Negroes; is that not correct?

Mr. Goshgarian: I object to that. The witness can still tell what his opinion is, on what it is based. He does not have to assent to remarks of counsel.

The Court: Answer the question. The objection is overruled.

The Witness: Would you repeat the question?

The Court: You can answer yes or no.

Will you read the question?

[The question referred to was read by the reporter.]

A. Yes.

Q. In the case of the white prospective customers, the basis for your believing them to be detrimental to your business is the fact that they were in company with the Negroes; is that not correct, sir?

[fol. 42] A. Yes, sir.

Q. Sir, at any time, did any of these defendants refuse to leave your premises upon request?

A. Yes, sir.

Q. When was that?

A. When I went around to the tables.

The Court: Speak a little louder, please.

The Witness: When I went around to the tables to inform them.

Q. How long a period after they had been on the premises was this?

A. Forty-five minutes, approximately.

Q. Is it not a fact that during the course of your first conversation with Mr. Perkins you told Mr. Perkins that the waitresses were busy right then?

A. No, sir.

Q. You made no such statement at all?

A. No, sir.

Q. Is it possible that these people came on your premises, as far as you know, at four-fifteen?

A. I am not exactly certain of the time, sir.

Q. Did you see Mr. Perkins proceed to the cashier before he came to speak to you?

A. I did.

[fol. 43] Q. Do you know whether or not the cashier directed him to you?

A. I can only assume she did.

The Court: If you do not know, say you do not know.

The Witness: I don't know.

Q. During the course of time that these people were seated in your restaurant, did you notice them having any brief conversation with the waitresses or other employees?

A. I did not observe that.

Q. Is it possible that such might have occurred, even though you were seated there and you would not see it?

A. I don't know.

Q. During the time you were seated in the restaurant, were there not other patrons frequenting the restaurant?

A. Yes, sir.

Q. These patrons were served?

A. Yes, sir.

Q. They ate their food?

A. Yes, sir.

Q. They paid for it?

A. Yes, sir.

Q. Did any special crowd gather during the period of time the defendants were in your restaurant?

A. Yes, sir.

[fol. 44] Q. Where did this crowd gather?

A. Directly outside the restaurant and in the restaurant.

Q. When was this?

A. All during the course of this incident.

Q. Can you estimate for us the number of people crowded around there?

A. I would say a hundred.

Q. Was this a mixed crowd? Were there Negroes and whites there?

A. I do not know.

Q. Is it not a fact that Shell's City does not have the official opinion that it is detrimental to their business for Negroes to purchase products in other parts of their store?

A. That is correct.

Q. So that Negroes are permitted in the premises?

A. Yes, sir.

Q. They are permitted to do business with Shell's City?

A. Yes, sir.

Q. Sir, I noted that you were quoted in the newspaper—

Mr. Goshgarian: I object to any quotation in the newspaper.

Mr. Ramer: I submit, Your Honor, that I am entitled to complete the question.

The Court: Go ahead.

[fol. 45] Do not answer the question.

Q. [Continuing] "I have been asked to drop charges. I do not see how we can at this point."

Are you under any coercion to testify here today?

The Court: I am going to sustain the first part of the objection but I will let him answer the second part.

Mr. Goshgarian: I am going to object to the second part. The State of Florida brought the action and not the witness. He would not be in any position to drop the action.

The Court: I have sustained the objection.

You can answer whether you were coerced. Were you, sir?

A. No, sir.

Q. Did anyone tell you that it would be impossible for you to drop these charges?

A. No, sir.

Q. Did you discuss the testimony you would give here today with anyone?

A. I have.

Q. Do you have any signs in your restaurant indicating that Negroes are not welcome on the premises and will not be served?

Mr. Goshgarian: To which the State objects. It is irrelevant and immaterial.

The Court: The objection is sustained.

[fol. 46] Q. Would you relate for us, again, please, the extent of your conversation with Mr. Perkins, when he came up to speak to you?

A. He excused himself and asked if I could answer a question and I said yes.

The Court: Speak louder.

The Witness: He said they had been sitting some time and had not been served and could I tell him when they were going to be served and I stated, "You are not going to be served."

He said, "I would like to discuss it with you," and I said, "I have nothing further to say."

Q. That was the extent of the conversation?

A. Correct.

Q. You testified that a crowd gathered during their stay in the restaurant. Was that crowd composed of employees of Shell's?

A. Partially.

Q. Did they come there at your request?

A. No, sir.

Q. Is it not true that the crowd primarily developed at the time the officer came upon the scene?

A. No, sir.

Q. It did not increase in any extent when the officer came upon the scene?

[fol. 47] A. I do not know, sir.

Mr. Ramer: No further questions.

[Whereupon, the witness was excused.]

Thereupon: WARREN C. WILLIAMS was called as a witness on behalf of the State and, after having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Goshgarian:

Q. Will you please state your full name and your address?

A. My name is Warren C. Williams. I reside at 465 Northeast 62nd Street.

Q. How long have you resided in Dade County, Florida?

A. Thirty-five years.

Q. Where are you employed?

A. I am employed by Shell's City, Inc., these past twenty-one years.

Q. What specific duties do you have?

A. I am vice president and auditor.

Q. How long have you been so employed?

A. I have been with them twenty-one years. I have been vice president, perhaps, fifteen years.

Q. Were you so employed on August 17, 1960?

A. Yes, sir.

[fol. 48] Q. Did you have occasion to go into the restaurant on that date?

A. Yes, sir.

Q. Approximately what time did you arrive there?

A. It was after five. About five-thirty, I would say, the best I could place it.

Q. Why did you go to the restaurant?

A. I received a call from my home, from one of my assistants, that there were five—

Q. Do not tell us the conversation.

Based on the call, you went to the restaurant; is that correct?

A. Yes, sir.

Q. What time did you arrive there?

A. In the neighborhood of five-thirty?

Q. What did you do immediately upon arriving at the restaurant?

A. I went into the restaurant and observed these colored people sitting there.

Q. Where were they seated, sir?

A. Well, there was one table of four sitting fairly close to the door. There was another table to the left of them, as well as I remember, at which there were four seated, and there was another table here [indicating] with four, [fol. 49] and a table more in the center of the restaurant at which this gentleman here was seated [indicating].

The Court: The gentleman on the end?

The Witness: He was seated in about the center of the restaurant and, then, to the west was another table at which three were seated.

Q. Were you present, Mr. Williams, when the officers arrived?

A. Yes, sir.

Q. Were you present when Sergeant Suggs arrived?

A. Yes, sir.

Q. Approximately what time did he arrive?

A. Well, it was some ten or fifteen minutes after I got there.

Q. Did you have occasion to accompany George McKelvey and Sergeant Suggs to each and every table?

A. Yes, sir.

Q. Please tell the Court just what happened at these tables.

A. We went to the first table—

Q. Who is "we"?

A. Mr. McKelvey and Sergeant Suggs and myself.

Q. In what order did you proceed?

A. Mr. McKelvey was in front, I believe. I know he was [fol. 50] in front at that time. Sergeant Suggs was next and I stood next to the Sergeant.

Q. Did you have occasion to hear the conversation between George McKelvey and the people at the tables?

A. Yes, sir.

Q. Tell the Court what you heard.

A. Mr. McKelvey told them, approximately, that we were

not going to serve them, and that we wished they would leave the premises.

Q. To whom did he tell this?

A. Well, he addressed it to the table in general but there seemed to be a leader at each table who sort of—

Mr. Ramer: Objection.

The Court: Sustained.

Q. Did he go to each table?

A. Yes.

Mr. Simon: To which we object. He has already answered that question.

The Court: I am going to ask that only one of you enter objections.

Mr. Simon: Yes. I will withdraw that objection.

The Court: Go ahead.

Q. Did you follow Sergeant Suggs and Mr. McKelvey to each and every table?

[fol. 51] A. Yes, sir.

Q. Was the same conversation repeated at each and every table?

A. The same conversation; yes, sir.

Q. Did the people who were seated at these tables leave when they were asked to do so?

A. No, sir.

Q. Were you there when they were placed under arrest?

A. Yes, sir.

Q. Did all this happen in Dade County, Florida?

A. Yes, sir.

Mr. Goshgarian: No further questions.

Cross examination.

By Mr. Simon:

Q. Mr. Williams, did you discuss with Mr. McKelvey the reason for refusing to serve these people?

A. No, sir.

Q. Do you know why these people were refused service at the restaurant?

A. Well, basically, it is the policy of Shell's City not to serve colored people in our restaurant.

Q. Why?

A. That is based upon the customs, the habits and what we believe to be the desire of the majority of the white [fol. 52] people of this county.

Q. Do you have any reason to believe that the service of Negroes in this restaurant would be detrimental to your business?

A. I think so, yes.

Q. Do you believe that your refusal to serve Negroes would be detrimental to your business?

A. No, sir.

Q. Is it not a fact that you have already seen evidence that the refusal to serve Negroes is detrimental to your business?

A. I have seen no evidence of it, no, sir.

Q. Do you feel you are pursuing a course which has no regard whatsoever for the rights of these people?

Mr. Goshgarian: I am going to object to that.

The Court: The objection is sustained. He is asking for a conclusion.

Q. You have several departments in your store, do you not?

A. Yes. Nineteen, I believe. Maybe twenty.

Q. Negroes are invited to participate and make purchases in eighteen of these departments?

A. Yes, sir.

Q. Can you distinguish between your feeling that it is not detrimental to have them served in eighteen departments and it is detrimental to have them served in the nineteenth department, namely, the lunch counter?

[fol. 53] A. Well, it goes back to what is the custom, that is, the tradition of what is basically observed in Dade County would be the bottom of it. We have—

Q. The custom that Negroes are not allowed to eat in restaurants where white people are?

The Court: I think you are getting away from the relevancy of this matter before the Court.

Mr. Simon: I will desist if the Court says so but, as Mr. Goshgarian so ably pointed out, the basis for his opinion that it is detrimental is a legal conclusion, which is a pertinent factor in this case. I think we are entitled to find out how he arrived at it.

The Court: I think he has answered the question.

The Witness: I am not familiar with the customer—

The Court: I do not think he is the manager.

Mr. Simon: He said he was a vice president.

The Court: Are you part of management?

The Witness: Yes.

The Court: Go ahead.

Q. Would you tell me what this custom is, that you are making reference to, that would prevent you from serving Negroes at your lunch counter?

A. I believe I already answered that, that it is the customs and traditions and practice in this county—not only [fol. 54] in this county but in this part of the state and elsewhere, not to serve whites and colored people seated in the same restaurant. That's my answer.

Q. Was that the sole reason, the sole basis, for your feeling that this was detrimental to your business?

A. Well, that is the foundation of it, yes, but we feel that at this time if we went into a thing of trying to break that barrier, we might have racial trouble, which we don't want. We have lots of good friends among colored people and will have when this case is over.

Q. Are you familiar with the fact that the Woolworth Stores in this community have eliminated this practice?

Mr. Goshgarian: To which the State objects. It is irrelevant and immaterial.

The Court: The objection is sustained.

Q. Was there any other reason you had for refusing to serve these people, other than the fact that they were Negroes or that the white persons among them were associated with the Negroes?

Mr. Goshgarian: Objection. That is not his testimony.

The Court: I do not believe I heard that, either. I will sustain the objection.

Mr. Simon: If Your Honor please, I will rephrase the question.

[fol. 55] Q. Why did you refuse to serve these people?

Mr. Goshgarian: I am going to object to that as being repetitious. He has answered the question twice already.

Mr. Simon: I understood he did and that he said—

The Court: I think he answered the question and, as I recall, he was not the gentleman who refused to serve them. He was merely present at the time, as I understand it.

I will sustain the objection.

Q. Do you know if Shell's City has a policy of refusing to serve Negroes in their restaurant?

Mr. Goshgarian: Objection. It is repetitious.

The Court: The objection is sustained.

Mr. Simon: I have no further questions.

[Whereupon, the witness was excused.]

Thereupon: JOHN P. SUGGS was called as a witness on behalf of the State and, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Block:

Q. Would you give the Court your full name?

A. John P. Suggs.

Q. With what department are you connected?

A. The Miami Police Department, Radio Patrol.

[fol. 56] Q. How long have you been in the Miami Police Department?

A. Twenty-one years.

Q. Your rank is that of sergeant?

A. Yes, sir.

Q. In what zone do you ride as sergeant?

A. Usually north of the river.

Q. Does that include the area in which Shell's City is located?

A. It does.

Q. Were you on duty in the late afternoon of August 17 of this year?

A. Yes, sir, I was.

Q. Did you receive a message to proceed, while you were on duty, to Shell's City?

A. I did.

Q. Did you go there?

A. I did.

Q. Were you riding alone or was there someone with you?

A. I was by myself.

Q. Were you in the performance of your duties at that time?

A. Yes, I was.

Q. Approximately what time did you arrive at Shell's City?

A. I arrived at approximately five-forty-five.

Q. Upon your arrival, approximately what part of Shell's [fol. 57] did you go into, Sergeant?

A. The east entrance of Shell's City.

Q. Did you then go into the restaurant?

A. Yes, sir.

Q. What did you observe in the restaurant?

A. Let me correct that. I went to the area of the restaurant, which is a glass enclosure, and at that time I met Mr. George McKelvey and Mr. Warren Williams.

Q. Then, what did you do?

A. They informed me of people that were there in the restaurant and they said they wanted them to leave.

Mr. Simon: I object to conversations with other people.

The Court: Was this in the presence of the defendants?

The Witness: No, sir.

The Court: The objection is sustained.

Q. Did you, in the company of Mr. George McKelvey, do anything in the restaurant?

A. Yes, sir, we did.

Q. Did you observe what Mr. McKelvey did in your presence and in the presence of the defendants?

A. Yes, sir.

Q. What did he do?

A. Mr. George McKelvey, myself and Mr. Williams went from one table to another of people that were sitting there [fol. 58] and Mr. McKelvey informed them he did not wish to serve them and wished them to leave.

Q. Did he address his remarks to a single particular individual or to the table and the parties seated there in general?

A. To the table. It is the small table.

Q. Will you recall as best you can the words Mr. McKelvey used?

A. To the best of my knowledge, he told them he did not wish to serve them.

Q. "Them"—plural?

A. Yes.

Q. What did he say as to that?

A. One or two of them he contacted raised a question of why and he said he had no further statement to make to them, and then we went from one table to the other until all these people were informed to leave and, after he informed them to leave, I advised them to leave myself.

Q. What did you do then?

A. After we had made the rounds of the tables, I went back to the first table we had contacted and asked them for identification.

Q. Prior to that, did you yourself ask each individual to leave?

[fol. 59] A. Not individual, but at the table group.

Q. Tell the Court what you told each table group.

A. After Mr. McKelvey informed them he would not serve them and they did not leave, I advised them to leave myself.

Q. Did you advise each of the table groups to leave?

A. Yes, sir.

Q. How long did you wait after doing that before taking your next action?

A. I arrived in there approximately at five-forty-five and I made a telephone call to my superior officer and proceeded to inform these people, with Mr. McKelvey, to leave and I took them into custody at five-fifteen—six-ten, rather.

Q. Approximately twenty minutes later?

A. About twenty minutes.

Q. What did you advise them upon taking them into custody?

A. After I took their names, which I wrote down—I made a list of identification—I asked for assistance from the superior officer and there was another police officer who came and I told him to take them into custody and to take them to the county jail.

Q. Did you advise them they were under arrest?

A. Not directly. I told him to place these people in custody.

Q. Were you involved in an incident at Shell's City concerning a mixed group some months back?

[fol. 60] A. Yes, sir.

Mr. Simon: Objection.

The Court: The objection is sustained.

Will you look around the courtroom and point out each of the people you placed under arrest?

Mr. Simon: I believe we already stipulated—

The Court: Do you stipulate that the officer can identify the defendants?

Mr. Simon: Yes.

The Court: Let the record so reflect.

Mr. Block: You may inquire.

Cross examination.

By Mr. Ramer:

Q. Officer Suggs, did you have any difficulty in entering the restaurant when you arrived on the scene?

A. No, sir.

Q. Did you have to make your way through a large number of people congregated at the entrance?

A. There was a small group there but no difficulty.

Q. At the time you came into the restaurant, were there other people besides the defendants seated at the tables?

A. Yes, sir.

Q. Eating their food?

A. Yes, sir.

[fol. 61] Q. Was there any other trouble in Shell's City upon your arrival of any kind that you could see, other than the problem that is involved here?

A. Not to my knowledge.

Q. When you instructed these defendants to leave, what was their demeanor at that time?

A. Well, in most instances, all they said was "Thank you."

In one or two instances, they raised a question, "Well, why?"

Q. Did any of them say, "No, we are not going to leave"?

A. They did not.

Q. I believe you made the last request; is that not correct?

A. As Mr. McKelvey informed them to leave, I advised each table, "You should leave."

Q. How much time elapsed between the time you told them to leave and they were all in custody?

A. Approximately twenty-five minutes.

Q. During that period of time, there was no rumpus or fuss or any loud noises or fighting or argument?

A. Well, as I first entered the restaurant or observed the restaurant from the glass enclosure, I could see some people at the counter discussing something with them. I could not hear what was going on.

Mr. Ramer: No further questions.

[fol. 62] [Whereupon, the witness was excused.]

Mr. Block: The State rests, your Honor.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Simon: Your Honor, at this time, the defendants will move for a judgment of acquittal. I would like to briefly state our reasons.

[Argument of counsel.]

The Court: Let the record reflect that the motion for directed verdict of not guilty is hereby denied.

Mr. Simon: Your Honor, there will be no testimony for the defendants. The defense rests.

The Court: Is there any further summation from either side?

Mr. Simon: None from the defendants.
Mr. Block: None from the State.

STATEMENT BY COURT

The Court: The Court has studied this particular law, the Florida Statute known as 509.141, and I find nothing in this law that has anything to do with color. I cannot find anywhere that it is discriminatory. It appears to the Court that this law is as applicable in Liberty City or Bunche Park restaurants as it is in Miami Shores.

The legislature of the State has seen fit to pass this law which has left to the discretion of hotels, motels, apartments and restaurant operators whether or not a person is detrimental to their business and whether or not they want [fol. 62a] to serve him irrespective of his color. They may refuse to serve or entertain such persons and be within the laws.

I have known certain restaurants that require certain attire when a patron goes in, such as a jacket or coat. As a matter of fact, I have been refused to be served in some restaurants because I was not attired in a manner commensurate with what they required.

I have heard the testimony adduced here by the State this morning. There is no question that they established a prima facie case beyond all reasonable doubt, based on the wording of the statute, and from the testimony, as adduced here at the trial, it appears conclusively that you young folks refused to leave and unlawfully remained in this restaurant known as Shell's City after you were requested to leave.

As to the sentence the Court intends to impose, we have a new statute regarding certain types of sentencing and I think it would be applicable in your case.

I am going to read this law because I think it is a law that an organization such s yours might heartiiy approve.

I am reading from Chapter 948 of the Florida Statutes:

> "If it appears to the Court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that

[fol. 63] the defendant shall presently suffer the penalty imposed by law, the Court, in its discretion may, without adjudging the defendant to be guilty, thereupon stay and withhold the adjudication of guilty and the imposition of sentence upon such defendant, and shall place him upon probation."

That is what I intend to do with you young folks. I am going to set that probationary status for a period of one year.

I think the courts are always open to protect those people and persons who engage in what we consider legitimate activities but I think the courts are just as prompt to prosecute those who do otherwise.

I urge you to accept this decision, at least for the time being.

If the Court is erroneous, I notice you have a bank of attorneys who are very capable and who can set the wheels in motion.

I do not think it is within your province to act, as citizens, in accordance with what you think the law should be.

Let the courts decide the legal issues.

Are there any motions at this time?

Mr. Simon: No, sir.

[Whereupon, the trial was concluded.]

[fol. 65] Certificate of the Clerk of the Court (omitted in printing).

[fol. 66]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Case No. 5041

(Criminal Appeal)

JAMES RUSSELL ROBINSON, et al., Appellants,

vs.

THE STATE OF FLORIDA, Appellee.

JUDGMENT—January 27, 1961

This cause coming on to be heard on oral argument after notice and the Court having read the briefs, heard oral argument and being fully advised in the premises, is of the opinion that Section 509.141 of the Florida Statutes is a valid exercise of the sovereignty of the State of Florida and that its application to the Appellants in this case does not deprive them of any of their rights under the constitutions of the United States or of the State of Florida. There being no other error urged on appeal the Court is of the opinion that the judgment and sentence in this cause should be and they hereby are affirmed.

It is so ordered this 27 day of January, 1961.

Robert H. Anderson, Circuit Judge.

[fol. 67]

IN THE CIRCUIT COURT OF DADE COUNTY

PETITION FOR REHEARING

The Appellants, by their undersigned counsel, respectfully petition this Honorable Court for a Re-Hearing in the within cause, and in support thereof state that the court, in its decision and opinion overlooked the fact that the case of Shelley vs. Kramer, 334 U.S. 1, requires that a state not be a party to a discriminatory action against an individual when said discriminatory action is based upon color or association with persons of color, and that the failure to apply the decision in that case to the facts in the case at bar constitutes a denial of due process of law, equal protection of laws, and privileges and immunities guaranteed to all citizens of the United States to the Appellants.

[fol. 68]

IN THE CIRCUIT COURT OF DADE COUNTY

ORDER DENYING REHEARING—February 22, 1961

This Cause having come on to be heard before me upon the Appellants' Petition for Re-Hearing, and the Court being fully advised in the premises, it is, upon consideration,

ORDERED that the Appellants' Petition for Re-Hearing be and the same is hereby denied.

Done and Ordered in Chambers at Miami, Dade County, Florida, this 22 day of February, 1961.

Robert H. Anderson, Circuit Judge.

[fol. 69]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

January Term, A.D. 1961

Tuesday, April 18, 1961

Case No. 61-179

JAMES RUSSELL ROBINSON, et al., Petitioners,

vs.

THE STATE OF FLORIDA, Respondent.

ORDER TRANSFERRING CASE TO SUPREME COURT OF FLORIDA—April 18, 1961

This cause having come on before the court on respondent's motion to dismiss and the court having considered said motion as a motion to transfer, it is ordered that the petition for Writ of Certiorari and all papers filed prior to April 25, 1961, shall on that date be transferred to the Supreme Court of Florida as the proper court having jurisdiction in this cause.

[fol. 70]

IN THE SUPREME COURT OF FLORIDA

July Term, A. D. 1961

Case No. 40,039

JAMES RUSSELL ROBINSON, et al., Petitioners,

vs.

THE STATE OF FLORIDA, Respondent.

OPINION—Filed July 14, 1961

By petition for certiorari we are requested to review a decision of a circuit court which sat as an appellate court to review an appeal from a conviction of a misdemeanor in a criminal court of record.

The problem which challenges our attention involves a number of jurisdictional complications which must be resolved.

Robinson and others were found guilty of a misdemeanor in the Criminal Court of Record of Dade County. Each moved for a directed verdict without specifying the grounds thereof. The motion was denied and the petitioners were placed on probation under Chapter 948, Florida Statutes.

In denying the motion for a directed verdict at the conclusion of the evidence, the trial judge stated:

> "The Court has studied this particular law, the Florida Statute known as 509.141, and I find nothing in this law that has anything to do with color. I cannot find anywhere that it is discriminatory. It appears to the Court that this law is as applicable in Liberty City or Bunche Park restaurants as it is in Miami Shores.
>
> [fol. 71] "The legislature of the State has seen fit to pass this law which has left to the discretion of hotels, motels, apartments and restaurant operators whether or not a person is detrimental to their business and whether or not they want to serve him irrespective of his color. They may refuse to serve or entertain such persons and be within the laws."

They thereupon appealed to the Circuit Court of Dade County seeking review of the misdemeanor conviction. Article V, Section 6, Florida Constitution. The record reveals that the petitioners were charged and found guilty of a violation of Section 509.141(3), Florida Statutes, which makes it a misdemeanor to refuse to leave a restaurant after being requested so to do. By their appeal to the Circuit Court they contended that the application of the statute approved by the trial court amounted to State action violative of Federal rights to due process and equal protection of the law. Our examination of the record does not reflect that these contentions were raised in the trial court. The matter was considered by the circuit judge acting in his appellate capacity. He entered a judgment stating that he was "of the opinion that Section 509.141 of the Florida Statutes is a valid exercise of the sovereignty of

the State of Florida and that its application to the appellants in this case does not deprive them of any of their rights under the Constitutions of the United States or of the State of Florida." The circuit judge thereupon affirmed the judgment of the trial court.

[fol. 72] By petition for a writ of certiorari filed in the District Court of Appeal, Third District, Robinson, et al., sought review of the appellate decision of the circuit judge. The respondent, State of Florida, filed a motion to dismiss the petition in the District Court of Appeal. That court treated the motion to dismiss as a motion to transfer the cause to the Supreme Court, and thereupon entered an order transferring the cause to this Court. All of the papers in the cause have been lodged here. We are now confronted by another motion of respondent, State of Florida, requesting us to dismiss the petition for certiorari. The matter has come on for hearing upon this motion which ordinarily would be disposed of without opinion. The complexities of the jurisdictional problems presented, however, appear to justify our discussion thereof for the future guidance of the Bar and other courts.

If a judgment or decree of a trial court passes directly upon the validity of a statute or construes a controlling provision of the State or Federal Constitutions review by appeal should be sought directly in this Court. Article V, Section 4, Florida Constitution; State v. Bruno, Fla., 104 So. 2d 588, 107 So. 2d 9; Boyd v. County of Dade, Fla., 123 So. 2d 323. The sum of these prior decisions simply is that when a trial court, by its final judgment or decree, passes directly on the validity of a statute or construes a controlling provision of the Constitution, then in the interest of a prompt and final disposition of these important questions, the appeal comes directly to this Court without the necessity of any intermediary consideration by any other appellate court. This is so even in the case of a misdemeanor conviction which otherwise would be considered by circuit courts. Article V, Section 6, Florida [fol. 73] Constitution; State v. Bruno, supra.

In view of these considerations, a circuit court *as an appellate court* reviewing a judgment of a criminal court of record, *is without jurisdiction to consider an appeal which*

passes directly on the validity of a statute or construes a controlling provision of the Constitution. This is so because appellate jurisdiction to dispose of such problems is expressly vested in the Supreme Court.

By the same token this Court no longer has extensive power to issue so-called "common law writs of certiorari" to review judgments of lower courts. This power is now vested in District Courts of Appeal and Circuit Courts, by Article V. Sections 5 and 6, Florida Constitution. In situations in which review of a judgment or decree of a lower court is not otherwise provided for, the District Courts of Appeal are endowed with powers of review limited to a determination of whether the judgment constitutes a deviation from the essential requirement of the law. In a general way, this is the type of so-called common law certiorari power exercised by this Court prior to the effective date of amended Article V, on July 1, 1957.

We do not here intend to convey any impression that the Constitution endows the courts of appeal with the power of passing upon the correctness of judgments or decrees which determine the validity of a statute or construe a controlling provision of the State or Federal Constitutions. Our holding simply is that a judgment of a circuit court properly sitting in the exercise of its appellate jurisdiction is subject to review by petition for certiorari, not here, but in the appropriate District Court of Appeal.

[fol. 74] Reverting now to the matter before us, it is clear that if the trial judge passed upon the validity of the statute the initial appeal should have been brought directly to this Court instead of to the circuit court. The record from which we have quoted above indicates that the trial judge did consider and passed upon the validity of Section 509.141(3), Florida Statutes. The Circuit Court of Dade County had no jurisdiction to review this judgment. Consequently, the order of the circuit court, passing on the subject statute, was without force and effect.

In the instant situation, as pointed out above, we are not authorized to review directly the decisions of a circuit court sitting as an appellate court. As an incident to the disposition of the matter, however, we have pointed out the constitutional impediments similarly applicable to the ap-

pellate jurisdiction of circuit courts in reviewing judgments of other trial courts which pass upon the validity of statutes. Under our constitutional system a district court of appeal is the only court which is authorized to issue a so-called common law writ of certiorari in this instance. In so doing, that court may then properly consider the proposition that the circuit court, in the exercise of its appellate jurisdiction, in the instant case exceeded its constitutional power and, therefore, deviated from the essential requirements of the law. Any judgment rendered by the court of appeal may then be tendered to us for review under those provisions of Article V, Section 4, Florida Constitution, which authorizes us to review decisions of courts of appeal.

Following the pattern established by the district court of appeal respondent's motion to dismiss the petition is treated as a motion to transfer. All papers are hereby re-
[fol. 75] transferred to the District Court of Appeal, Third District and shall be forwarded to that court immediately upon the expiration of five days of the date of this order for further consideration and ultimate disposition in accord with the provisions hereof.

It is so ordered.

[fol. 76]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

July Term, A.D. 1961

Case No. 61-179

JAMES RUSSELL ROBINSON, et al., Petitioners,

vs.

THE STATE OF FLORIDA, Respondent.

OPINION—Filed September 21, 1961

This cause was transferred to the Supreme Court of Florida by an order dated April 25, 1961. The Supreme

Court's decision was rendered on July 14, 1961, retransferring the cause to this court.

We have considered the petition for certiorari and opinion of the Supreme Court of Florida in connection with the jurisdictional question involved and herewith adopt as the opinion and judgment of this court the opinion and judgment of the Supreme Court of Florida rendered July 14, 1961, case #40,039.

Accordingly, the petition for certiorari is granted and the questioned order of the circuit court is quashed. It is so ordered.

[fol. 77]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

July Term, A.D. 1961

[Title omitted]

OPINION—Filed December 4, 1961

This court, on September 21, 1961, quashed an order of affirmance entered by the circuit court in this cause. The petitioners, after the quashal of the circuit court's order of affirmance, moved, inter alia, for a transfer of the appeal from the circuit court to the Supreme Court of Florida. This motion was denied and the appeal in the circuit court was dismissed. It is the latter order of which the petitioners complain.

This court, after hearing oral argument, concludes that the cause should be transferred by the circuit court to the Supreme Court of Florida in accordance with the applicable statute and the appellate rule. In reaching this conclusion, we should point out, in fairness to the trial judge, that no such directions were contained in this court's order quashing the circuit court's order of affirmance.

Accordingly, this cause is remanded to the circuit court with the request that the trial judge transfer the appeal and all the papers in connection therewith, to the Supreme Court [fol. 78] of Florida, in accordance with the opinion of that court rendered July 14, 1961. It is so ordered.

[fol. 79]

IN THE SUPREME COURT OF FLORIDA

July Term, A. D. 1962

JAMES RUSSELL ROBINSON, et al., Appellants,

vs.

THE STATE OF FLORIDA, Appellee

OPINION—Filed September 19, 1962

This case finally reaches us by an order of the Circuit Court of the Eleventh Judicial Circuit transferring an appeal from a judgment of the Criminal Court of Record of Dade County which passed upon the validity of a state statute.

The case traveled here by a circuitous and devious route which is not approved and which should be meticulously avoided in the future. See, Robinson v. State, Fla. 1961, 132 So. 2d 3.

Robinson and others were found to be guilty of a misdemeanor in the Criminal Court of Record of Dade County. In denying a motion for a directed verdict at the conclusion of the evidence, the trial judge expressly sustained the validity of Section 509.141, Florida Statutes. The cited statute makes it a misdemeanor for a person to refuse to leave a restaurant after being requested so to do. The judgment of the criminal court was appealed to the circuit court. It should have been brought directly here under Article V, Section 4, Florida Constitution, which provides for direct appeal to this Court from final judgments of trial courts "directly passing upon the validity of a state statute." Evidently, this provision was never brought to the attention of the circuit judge. Moreover, [fol. 80] pursuant to requirements of the Constitution this Court has adopted Florida Appellate Rule 2.1a(5)(d), which reads in part as follows:

> "When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion or on motion of either party to the cause enter an order transferring it to the court having jurisdiction.. . ."

In the instant case the circuit court sat as an appellate court. Florida Appellate Rule 1.3. It is evident that the provisions of the foregoing rule were not invoked when this matter was originally before the circuit court in the exercise of its appellate jurisdiction. At that time the case should have been transferred immediately to this Court. In fact, it never should have been taken to the circuit court in the first instance. Robinson v. State, supra. Instead of being brought here directly as the Constitution contemplates, the appeal took a tortuous route through the circuit court, thence by petition for certiorari to the District Court of Appeal which transferred to us the petition for certiorari. Whereupon, we were compelled, State v. Robinson, supra, to transfer the matter back to the District Court which in turn remanded it to the circuit court, which finally sent the original appeal to this Court where it should have been at the beginning of the appellate process.

Were we to condone this procedure it would be an invitation to litigants to ignore completely the requirements of the Constitution governing appeals. Litigants could merely follow the course which seemed to them to be most desirable, by selecting the appellate court of their own [fol. 81] choice with the hope of finding somewhere along the line a decision suiting their desires.

In cases of the type now before us, the circuit court at the outset had no jurisdiction to do anything but transfer the appeal here. Instead, it proceeded to attempt to exercise complete appellate jurisdiction. Under the procedure followed in this case we would doubtless be justified in dismissing this appeal on the ground that the appellants had elected to proceed to a conclusion in the wrong forum instead of seeking the benefit of Rule 2.1a(5)(b), and thereby getting on the right track to move forward to final adjudication in the forum which had the power to proceed.

However, inasmuch as the case is now finally here, we will proceed to dispose of it because we do have jurisdiction. We have included the foregoing discussion for the guidance of the Bar in the future, in the hope that there will be no repetition of the procedure which was undertaken in the instant case.

We find it unnecessary to engage in any prolonged discussion of the merits of the case. The sole point presented is the matter of the validity vel non of Section 509.141, Florida Statutes. We have concluded, as did the trial judge, that the statute is nondiscriminatory and that it reflects a valid exercise of the legislative power of the State of Florida. Having so concluded, we find no reason to disturb the judgment of the Criminal Court of Record here under assault.

It is, therefore, affirmed.

It is so ordered.

[fol. 82]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 31,723

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETT BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, DR. CARL ELLIOTT YEAGER, JR., Appellants,

v.

THE STATE OF FLORIDA, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 3, 1962

I.

Notice Is Hereby Given that James Russell Robinson, Joseph Price Perkins, Marvin Edison Robinson, Thomas Vawn Roland, James H. Lane, Thomas Walter Gither, Barry M. Cohen, Angeline E. Butler, Henry Pringle, Bernard Lafayette, Oliver William St. Pee, Leon Everett Bailey, Dorothy R. Miller, Patricia Stephens, Pricilla Stephens, Alice M. Parham, Robert Paul Young, Dr. Carl Elliott Yeager, Jr., the Appellants above named, hereby appeal to the Supreme Court of the United States from the Order and Opinion of the Supreme Court of Florida in the above styled cause, filed September 19, 1962, wherein the Supreme Court of Florida affirmed the judgment of the Criminal Court of Records in and for Dade County, Florida and sustained the validity of Florida Statutes Section 509.141(3).

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II.

The Clerk of the Supreme Court of Florida will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Information filed August 19, 1960
2. Argument, pleas of not guilty and waivers of jury trial (Minutes of Clerk) filed August 22, 1960
3. Trial (Minutes of Clerk) of August 26, 1960

[fol. 83] 4. Oral Motion for Directed Verdict and Order Denying Motion (Minutes of Clerk) of August 26, 1960

5. Order granting probation as to Defendant James Russell Robinson dated August 26, 1962
6. Clerk's recitation of entry of Orders granting probation as to the Defendants dated August 26, 1960
7. Notice of Appeal to Circuit Court for the Eleventh Judicial Circuit in and for Dade County, filed September 21, 1960
8. Assignment of Errors to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, filed September 21, 1960
9. Directions to Clerk for preparing transcript of record on appeal dated October 19, 1960
10. Reporter's transcript of testimony and proceedings at trial held August 26, 1960
11. Index to reporter's transcript
12. Certificate of the Court reporter
13. Certificate of the Clerk of the Criminal Court of Record in and for Dade County, Florida dated October 27, 1960
14. Order Affirming Judgment and Sentence Appealed from, entered by the Circuit Court of the Eleventh

Judicial Circuit in and for Dade County, Florida, Criminal Appeal Case No. 5041 entered by Hon. Robert H. Anderson, Circuit Judge on January 27, 1961

15. Petition for Rehearing filed in said Circuit Court on or about February 21, 1961

16. Order of said Circuit Court denying said Petition for Rehearing, dated February 22, 1961 entered by Hon. Robert H. Anderson, Circuit Judge

* * * * * * *

[fol. 84] 18. Order of District Court of Appeal transferring case to Supreme Court of Florida dated April 18, 1961

19. Opinion of Supreme Court of Florida filed July 14, 1961

20. Opinion of District Court of Appeal filed September 21, 1961

21. Opinion of District Court of Appeal filed December 4, 1961

* * * * * * *

24. Opinion and Order of the Supreme Court of Florida affirming the judgment of the Criminal Court of Record, dated September 19, 1962, Case No. 31,723

25. This Notice of Appeal

III.

The following question is presented by this appeal:

Where Negroes and white persons in association with them remain in a restaurant after the manager thereof has refused to serve them and has requested them to leave the premises, and when the manager's refusal to serve and request to leave is based upon the fact that these persons are Negroes or in association with Negroes, and when the police at the manager's request, arrest these persons because of their refusal to comply with the manager's request to leave the premises, is the arrest and subsequent conviction of these persons for alleged violation of Florida Statutes Sec.

509.141(3) a violation of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution and a violation of the privileges and immunities of State and Federal Citizenship guaranteed by the Federal Constitution?

Tobias Simon, Attorney for Appellants, 706 Ainsley Building, Miami 32, Florida.

[fol. 86] Clerk's Certificate (omitted in printing).

[fol. 87]

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA, THIRD DISTRICT

Case No. 61-179

PETITION FOR WRIT OF CERTIORARI

To the District Court of Appeal of Florida, Third District:

Petitioners, by and through their undersigned counsel, present this, their Petition for Writ of Certiorari and state:

1. Petitioners seek to have reviewed an Order of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida dated the 27th day of January, 1961 and recorded in the records of said Court on the 30th day of January, 1961 in the Circuit Court Appeal Minutes Book 451, page No. 312, and an Order denying the Re-hearing of said Court dated the 22nd day of February, 1961 and recorded in the records of said Court on the 23rd day of February, 1961 in the Circuit Court Appeal Minutes Book 451, page No. 352.

2. This Petition is presented under and pursuant to Article V, Section 5 (3) of the Florida Constitution and Rule 4.5(c) of the Florida Appellate Rules.

3. This Petition is accompanied by a certified transcript of the record of the proceedings, including the decision Petitioners seek to have reviewed, and a supporting Brief.

[fol. 88] 4. The following are the facts of the case:

(a) The State of Florida charge in an information filed against Petitioners that they did on August 17, 1960 in Miami, Florida:

> "unlawfully remain or attempt to remain in a restaurant after being requested to depart therefrom in violation of Section 509.141 (3), Florida Statute, in that the above-named defendants at the aforesaid time and place did then enter the premises located at 5941 Northwest 7th Avenue, in the County and State aforesaid, said premises being then and there owned and operated by SHELL CITY INC., a Florida Corporation, and which said premises were then and there being operated as a restaurant under the name SHELL CITY RESTAURANT; that the above named defendants did then and there seat themselves as guests at tables in the aforesaid restaurant; and that said above-named defendants did then and there unlawfully remain or attempt to remain in the aforesaid restaurant after said above-named defendants had been requested to depart there-from by the manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant, said manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant being then and there of the opinion that if the above-named defendants were entertained or served it would be detrimental to the said restaurant, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." (R. 2, 3)

For purposes of these certiorari proceedings, Petitioners admit the material allegations of fact alleged by the State in its information, above.

(b) Petitioners constituted a party Negro and White persons, and the management of the Shell City Restaurant admitted that the reason it refused to serve Petitioners and requested them to leave is that it did not serve Negroes nor did it serve White persons in company with

Negroes, and that, therefore, it had Petitioners expelled from the restaurant by the police because of this policy of racial discrimination. (R. 40, 50-53)

[fol. 89] (c) Trial was held before the Honorable George E. Schulz, Judge of the Criminal Court of Record in and for Dade County, on August 26, 1960. Following the presentation of the State's case, Petitioners moved for a judgment of acquittal, but their motion was denied. (R. 61) The Petitioners presented no evidence. The Trial Court then entered judgment pursuant to Chapter 948, Florida Statutes, wherein the Court ordered that an adjudication of guilt and the imposition of sentence be stayed and withheld, and placed Petitioners on probation for terms of one year each.

5. On the foregoing facts the Courts below were presented with the following point of law:

> "Where Negroes and white persons in association with them remain in a private restaurant after the manager thereof has refused to serve them and has requested them to leave the premises, and when the manager's refusal to serve and request to leave is based upon the fact that these persons are Negroes or in association with Negroes, and when the police at the manager's request, arrest these persons because of their refusal to comply with the manager's request to leave the premises, is the arrest and subsequent conviction of these persons for alleged violation of F.S. Sec. 509.141 (3) a violation of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution and a violation of the privileges and immunities of state and federal citizenship guaranteed by the Federal Constitution?"

On this point of law both the Trial Court and the Circuit Court ruled that there was no violation of Petitioners' rights claimed under the Federal Constitution.

6. Petitioners submit that the foregoing point of law must be answered in the affirmative in view of the decision of the United States Supreme Court in *Shelley* v.

Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L. Ed. 116 (1948), wherein the Court announced the principle that no arm of any State government may lend its coercive power to the effectuation of any private policy or program of racial discrimination.

[fol. 90] Wherefore, Petitioners request this Court to grant a Writ of Certiorari and enter its Order quashing the Orders of the Circuit Court below and quashing the judgments of the Criminal Court of Record below, and granting such other and further relief as should seem right and proper to the Court.

[fol. 92]

IN THE SUPREME COURT OF FLORIDA

No. .....

Appeal from the Criminal Court of Record of Dade County, Florida.

MOTION OF APPELLEE TO DISMISS THE APPEAL

Comes now the State of Florida, appellee herein, by the State Attorney and shows to the Court that:

1. On the 26th day of August, A. D. 1960, appellants were found guilty in the Criminal Court of Record in and for Dade County, Florida, of the charge of Unlawfully Remaining In A Restaurant After Having Been Requested To Leave and that the said Court entered an order and judgment that "an adjudication of guilt and the imposition of sentence be, and the same are hereby, stayed and withheld and the defendant, James Russell Robinson, is hereby placed on probation in the custody of the probation officer of this Court for the term of one year", and that on the same day, to-wit: the 26th day of August, A. D. 1960, the said Court entered an identical order with respect to each of the co-defendants in said case, namely, Joseph Price Perkins, Marvin Edison Robinson, Thomas Vawn Roland, James H. Laue, Thomas Walter Gaither, Barry M. Cohen, Angeline E. Butler, Henry Pringle, Bernard Lafayette, Oliver William St. Pee, Leon Everette Bailey, Dorothy

R. Miller, Patricia Stephens, Pricilla Stephens, Alice M. Parham, Robert Paul Young and Dr. Carl Elliott Yeager, Jr., which said orders granting probation were recorded in the minutes of said Criminal Court of Record in Minute Book No. 25 on pages 3, 4, 5, 6, 8, 9, 11, 13, 15, 16, 18, 19, [fol. 93] 21, 23, 25, 27 and 29 respectively as shown by the transcript of the record at pages 13 and 14.

2. The said period of probation of one year fixed in the aforesaid orders expired on the 26th day of August, A.D. 1961;

3. The statute which the appellants were found guilty of violating is Section 509.141, F. S. A., and said statute provides in sub-section (3) thereof that violators thereof shall be guilty of a misdemeanor but does not provide any specific punishment therefor and that under Section 775.07, F. S. A., the punishment for misdemeanors, when not otherwise provided by statute, is by a fine not exceeding $200.00 or imprisonment not exceeding 90 days.

4. In consequence of the foregoing, that is to say, because the time within which the said Criminal Court of Record could impose a sentence expired 90 days after the 26th day of August, A. D. 1960, on which date the appellants were found guilty except that such time was extended by the said order placing appellants on probation for a period of one year from said 26th day of August, A. D. 1960, and the said period of probation expired on the 23rd day of August, A.D. 1961. The said Criminal Court of Record has lost its power and jurisdiction to impose any sentence on appellants and to take any further action in said cause.

Wherefore, appellee moves the Supreme Court to dismiss the appeal herein on the ground that said appeal is moot.

[fol. 94]

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1962

Tuesday, February 6, 1962

JAMES RUSSELL ROBINSON, et al., Appellants,

vs.

THE STATE OF FLORIDA, Appellee.

The motion of the appellee to dismiss the appeal in the above cause has been considered and is denied.

[fol. 95]

SUPREME COURT OF THE UNITED STATES

No. 748—October Term, 1962

JAMES RUSSELL ROBINSON, et al., Appellants,

vs.

FLORIDA.

ORDER NOTING PROBABLE JURISDICTION—June 10, 1963

Appeal from the Supreme Court of the State of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

June 10, 1963

Office-Supreme Court, U.S.
FILED
JAN 16 1963
JOHN F. DAVIS, CLERK

U. S.

In The
Supreme Court of the United States

October Term, 1962

No. [redacted] 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

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In The
Supreme Court of the United States

October Term, 1962

No. _____

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Florida filed September 19, 1962 and set forth

herein and respectfully submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported in 144 So.2d 811, and said opinion is set forth in Appendix A hereto.

JURISDICTION

These proceedings began with a criminal information filed against Appellants by the State of Florida on August 17, 1960 pursuant to Florida Statutes, Sec. 509.141. Appellants were found by the Criminal Court of Record in and for Dade County, Florida, to have violated said Statute, and judgments were entered against them on August 26, 1960. Notice of Appeal to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida, was filed on September 21, 1960, and the judgments of the trial court were ultimately affirmed by the Supreme Court of Florida in its Order and Opinion filed September 19, 1962.

Jurisdiction of this appeal is conferred upon the Supreme Court of the United States by Title 28 U. S. Code, Sec. 1257(2). Cases sustaining the jurisdiction of this Court are *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); *Winters* v. *New York*, 333 U.S. 507, 68 S.Ct. 665, 81 L.Ed. 1066 (1948); and *Lowell* v. *Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

STATUTE INVOLVED

The validity of Florida Statutes, Section 509.141 is involved. Said Statute is set forth in Vol. 2, 1961 Florida Statutes, page 2257; and is set forth in Appendix B hereto.

QUESTION PRESENTED

Where a group of Negroes and white persons in association with Negroes remain in a private restaurant after the manager thereof has refused to serve them and has requested them to leave the premises; and where the manager's refusal to serve and his request to leave is based upon the fact that said group comprises Negroes and persons in association with Negroes; and where the police, at the manager's request, arrest said group of persons because of their refusal to comply with the manager's request to leave the premises; is the arrest and subsequent conviction of this group of persons for alleged violation of Florida Statutes Section 509.141 a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution and a violation of the privileges and immunities of State and Federal citizenship guaranteed by the Federal Constitution?

STATEMENT

The State of Florida filed an information against Appellants which charged that on August 17, 1960 they did, in Miami, Florida:

> "unlawfully remain or attempt to remain in a restaurant after being requested to depart there-

from in violation of Section 509.141(3), Florida Statute, in that the above-named defendants at the aforesaid time and place did then and there enter the premises located at 5941 Northwest 7th Avenue, in the County and State aforesaid, said premises being then and there owned and operated by SHELL CITY, INC., a Florida Corporation, and which said premises were then and there being operated as a restaurant under the name SHELL CITY RESTAURANT; that the above-named defendants did then and there seat themselves as guests at tables in the aforesaid restaurant; and that said above-named defendants did then and there unlawfully remain or attempt to remain in the aforesaid restaurant after said above-named defendants had been requested to depart therefrom by the manager, assistant manager, or other person in charge or in authority of the aforesaid restaurant, said manager, or other person in charge or in authority of the aforesaid restaurant being then and there of the opinion that if the above-named defendants were entertained or served it would be detrimental to the said restaurant, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." (R. 2, 3)

Trial was held in the Criminal Court of Record in and for Dade County, Florida on August 26, 1960. Following the presentation of the State's case, Appellants moved for a judgment of acquittal, but their motion was denied (R. 61). The Appellants presented no evidence. The trial court then entered judgments pursuant to Flor-

ida Statutes, Chapter 948, wherein it ordered that an adjudication of guilt and the imposition of sentence be stayed, and placed Appellants on probation.

For the purposes of this Appeal, Appellants admit as true the material allegations of fact alleged by the State in its information, *supra*. However, additional evidence was adduced at the trial which Appellants submit shows that the arrests and convictions herein were in clear violation of Appellants' constitutional rights.

Appellants constituted a party of Negro and white persons, and the manager of the Shell City Restaurant admitted that the reason that he refused to serve Appellants and requested them to leave the premises is that the store did not serve Negroes, and that he therefore had Appellants expelled from the restaurant by the police because of this policy of racial discrimination (R. 40). The vice-president of Shell's also testified that there are nineteen departments in the store; that Negroes are invited to participate and make purchases in eighteen of these departments; but that they are not served in the nineteenth department, namely, the restaurant (R. 50-53).

The information did not charge, nor does the record contain any allegation or evidence that Appellants were boisterous, noisy or unruly or otherwise engaged in any disorderly conduct.

HOW FEDERAL QUESTION IS PRESENTED Appellants first raised the federal question in their motion for judgment of acquittal following the presentation of the State's case at the trial, wherein Appellants contended that they were deprived of the equal protection of the laws,

due process of law, and privileges and immunities guaranteed by the Federal Constitution, and the trial court ruled against Appellants on their motion (R. 61-62). Appellants again raised these questions in their Assignments of Error on Appeal from the judgments of the trial court (R. 17).

THE FEDERAL QUESTION IS SUBSTANTIAL

1. Appellants submit that the judgment below is in conflict with this Court's ruling in *Shelley* v. *Kramer*, 334 U.S. 1; 68 S. Ct. 836; 92 L.Ed. 1161 (1948), wherein a party to a racial restrictive covenant sought to enjoin the sale by one owner in a subdivision to a Negro purchaser. In refusing injunctive relief, this Court concluded that no arm of a State Government may exercise its coercive powers to effectuate racial discrimination at the behest of a private party. In the case at bar, Shell's City called upon the police of Miami to evict Appellants from the restaurant solely for the reason of racial discrimination. The police, aided by the Trial Court below, therefore effectuated this private party's racial policy by the arrests and convictions of the Appellants. In *Shelley*, this Court refused to permit a State agency to protect or effectuate a private party's property right in the form of contract, viz., the restrictive covenant. In the instant case, Appellants submit that the courts of Florida may not lend their coercive power to protect the alleged property right of Shell's City to refuse to serve or accommodate persons solely for the reasons that they are Negroes or in association with Negroes. The action of the police and the State courts, Appellants submit, amounts to State action in support of racial discrimination and therefore is a denial of the equal

protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

2. Appellants submit that the judgments below are in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Valle* v. *Stengle*, 176 F.2d 697 (1949). Plaintiffs there brought suit under the Civil Rights Act alleging a denial of rights guaranteed under the Fourteenth Amendment. Their complaint alleged that they were both Negroes and whites; that the defendants were the corporate owner of Palisades Amusement Park in New Jersey, the individual managers of the park and the local Chief of Police; that the park was privately and not publicly owned; that the park admitted members of the public upon payment of fees; that the park contained a pool and that persons admitted to the park were admitted to the pool upon the payment of an additional fee; that plaintiffs were admitted to the park and were in possession of duly purchased tickets; that plaintiffs were refused admission to the pool on the ground that their party contained Negroes; that the Chief of Police aided and abetted the managers and the corporate owner in refusing plaintiff's admission to the pool and aided and abetted the ejectment of plaintiffs from the park.

The District Court granted defendants' Motion to Dismiss the complaint, but was reversed on appeal. The Court of Appeals stated that the arrests were presumably pursuant to a state statute relating to minor breaches of the peace. 176 F.2d 697, 701. The Court then stated that:

> " . . . the plaintiffs were denied the equal protection of the laws within the purview of the Fourteenth Amendment because they were Ne-

groes or acting in association with Negroes when they attempted to gain admission to the pool at Palisades Park. They, or some of them, were ejected from the park, were assaulted and were imprisoned falsely, as alleged in the complaint, because they were Negroes or in association with Negroes, and were denied the right to make or enforce contracts, all within the purview of and prohibited by R. S. 1977." 176 F.2d 697, 702.

R.S. 1977 (42 U.S.C.A., § 1981) provides that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and proceedings for the security of persons and property as is enjoyed by white citizens".

The Court also held that there was a deprivation of the plaintiff's privileges and immunities, and stated that:

> "If a man cannot make or enforce a contract already made because of the interference of a State officer he is being denied a civil right . . . the liberty involved is in fact the liberty of contract . . . to refuse to an individual the liberty of contract is to put him beyond the pale of capitalism. Thus ostracized, he cannot engage in the acquisition of property or in the pursuit of happiness. It is clear that the Supreme Court has held that the words 'privileges and immunities' of Article IV, Section 2, protect the right of a citizen to engage in lawful commerce, trade or business without molestation or harassment

> . . . The field of human rights covered by the privileges and immunities clause is indeed a broad one. The individual defendants, acting in concert, if the allegations of the complaint are to be believed, have denied to the plaintiffs the privileges and immunities of citizenship." 176 F.2d 697, 703.

The Court added that:

> "the phrase 'to make contracts' of R.S. Section 1977 clearly shows that Congress had in mind much more than enforcing a contract, already made, by legal proceeding." 176 F.2d 697, 703.

The Court in *Valle* held that the right to solicit contracts may not be violated by State action where such action is prompted by the fact that the soliciting parties are Negroes or persons acting in association with Negroes. In the case at bar, Appellants were denied the right to engage in commerce with Shell's City and were denied such right because of the fact that they are Negroes or persons in association with Negroes. Appellants submit that these are parallel cases and the Court of Appeals for the Third District has announced a just and proper construction of the Constitution.

3. Petitioners submit that the judgments below are in conflict with the principle announced by this Court in *Marsh* v. *Alabama*, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946). In *Marsh*, a member of Jehovah's Witnesses had distributed religious literature on the sidewalks of a so-called company-owned town, and had been arrested and convicted for violating a state statute prohibiting one from

entering or remaining on the premises of another after having been warned not to do so. This Court reversed the conviction as being a violation of freedom of the press and freedom of religion, and notwithstanding the fact that the acts proscribed by State law took place on privately-owned property. This Court stated that:

> "In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute." 326 U.S. 501, 509, 90 L.Ed. 265, 270.

Likewise in the case at bar, Appellants submit that the State of Florida cannot justify the deprivation of Appellants' right to equal protection of the laws and cannot justify the enforcement of a policy of racial discrimination solely because Appellant's conduct, presence and acts occurred on private premises. In *Marsh* the Court stated that:

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." 326 U.S. 501, 539, 90 L.Ed. 265, 270

Appellants submit that their rights to the equal protection of the laws and freedom from racial discrimina-

tion occupy the same "preferred position" as the rights which this Court protected in *Marsh* v. *Alabama*, *supra*. Moreover, as Mr. Justice Douglas stated in his concurring opinion in *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961):

> "Restaurants, whether in a drug store, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the states may not enforce a policy of racial segregation."

> "One can close the doors of his home to anyone he desires. But one who operates an enterprise under a license from the government enjoys a privilege that derives from the people. Whether retail stores, not licensed by the municipality, stand on a different footing is not presented here. But the necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group."

CONCLUSION

For the foregoing reasons, Appellants submit that the questions here presented are substantial and of great public importance and warrant plenary consideration by this Court.

Respectfully submitted,

TOBIAS SIMON
Counsel for Appellants
233 Southeast First Street
Miami 32, Florida

CERTIFICATE OF MAILING

I, TOBIAS SIMON, Counsel for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on January , 1963, I served copies of the foregoing Jurisdictional Statement on the Appellee, STATE OF FLORIDA, by mailing a Copy thereof in a duly addressed envelope with postage prepaid to the office of RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida, and by further mailing a copy thereof to the Honorable RICHARD IRVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

TOBIAS SIMON

Counsel for Appellants
233 Southeast First Street
Miami, Florida

APPENDIX A

OPINION OF SUPREME COURT OF FLORIDA, filed September 19, 1962 in JAMES RUSSELL ROBINSON, et al., v. THE STATE OF FLORIDA, 144 So.2d 811.

THORNAL, J.

This case finally reaches us by an order of the Circuit Court of the Eleventh Judicial Circuit transferring an appeal from a judgment of the Criminal Court of Record of Dade County which passed upon the validity of a state statute.

The case traveled here by a circuitous and devious route which is not approved and which should be meticulously avoided in the future. See, Robinson v. State, Fla. 1961, 132 So.2d 3.

Robinson and others were found to be guilty of a misdemeanor in the Criminal Court of Record of Dade County. In denying a motion for a directed verdict at the conclusion of the evidence, the trial judge expressly sustained the validity of Section 509.141, Florida Statutes. The cited statute makes it a misdemeanor for a person to refuse to leave a restaurant after being requested so to do. The judgment of the criminal court was appealed to the circuit court. It should have been brought directly here under Article V, Section 4, Florida Constitution, which provides for direct appeal to this Court from final judgments of trial courts "directly passing upon the validity of a state statute." Evidently, this provision was never brought to the attention of the circuit judge. Moreover, pursuant to requirements of the Constitution this Court has adopted Florida Appellate Rule 2.1a(5)(d), which reads in part as follows:

> "When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion or on motion of either party to the cause enter an order transferring it to the court having jurisdiction . . . "

In the instant case the circuit court sat as an appellate court. Florida Appellate Rule 1.3. It is evident that the provisions of the foregoing rule were not invoked when this matter was originally before the circuit court in the exercise of its appellate jurisdiction. At that time the case should have been transferred immediately to this Court. In fact, it never should have been taken to the circuit court in the first instance. Robinson v. State, supra. Instead of being brought here directly, as the Constitution contemplates, the appeal took a tortuous route through the circuit court, thence by petition for certiorari to the District Court of Appeal which transferred to us the petition for certiorari. Whereupon, we were compelled, State v. Robinson, supra, to transfer the matter back to the District Court which in turn remanded it to the circuit court, which finally sent the original appeal to this Court where it should have been at the beginning of the appellate process.

Were we to condone this procedure it would be an invitation to litigants to ignore completely the requirements of the Constitution governing appeals. Litigants could merely follow the course which seemed to them to be most desirable, by selecting the appellate court of their own choice with the hope of finding somewhere along the line a decision suiting their desires.

In cases of the type now before us, the circuit court

at the outset had no jurisdiction to do anything but transfer the appeal here. Instead, it proceeded to attempt to exercise complete appellate jurisdiction. Under the procedure followed in this case we would doubtless be justified in dismissing this appeal on the ground that the appellants had elected to proceed to a conclusion in the wrong forum instead of seeking the benefit of Rule 2.1a(5)(b), and thereby getting on the right track to move forward to final adjudication in the forum which had the power to proceed.

However, inasmuch as the case is now finally here, we will proceed to dispose of it because we do have jurisdiction. We have included the foregoing discussion for the guidance of the Bar in the future, in the hope that there will be no repetition of the procedure which was undertaken in the instant case.

We find it unnecessary to engage in any prolonged discussion of the merits of the case. The sole point presented is the matter of the validity vel non of Section 509.141, Florida Statutes. We have concluded, as did the trial judge, that the statute is non-discriminatory and that it reflects a valid exercise of the legislative power of the State of Florida. Having so concluded, we find no reason to disturb the judgment of the Criminal Court of Record here under assault.

It is, therefore, affirmed.

It is so ordered.

ROBERTS, C. J., DREW, O'CONNELL and HOBSON (Ret.), JJ., concur

APPENDIX B

FLORIDA STATUTES, SECTION 509.141:

(1) The manager, assistant manager, desk clerk or other person in charge or in authority in any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall have the right to remove, cause to be removed, or eject from such hotel or apartment house, tourist camp, motor court, restaurant, rooming house or trailer court in the manner hereinafter provided, any guest of said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, who, while in said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises is intoxicated, immoral, profane, lewd, brawling, or who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court or such as to injure the reputation or dignity or standing of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or who, in the opinion of the management, is a person whom it would be detrimental to such hotel, apartment house, tourist camp, motor court, restaurant, rooming house, or trailer court for it any longer to entertain.

(2) The manager, assistant manager, desk clerk or other person in charge or in authority in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall first orally notify such guest that the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court no longer

desires to entertain him or her and request that such guest immediately depart from the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court. If such guest has paid in advance the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall, at the time oral or written request to depart is made, tender to said guest the unused or unconsumed portion of any such advance payment. Said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court may, if its management so desires, deliver to such guest written notice in form as follows:

> "You are hereby notified that this establishment no longer desires to entertain you as its guest and you are requested to leave at once and to remain after receipt of this notice is a misdemeanor under the laws of this state."

(3) And any guest who shall remain or attempt to remain in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises.

(4) In case any such guest, or former guest, of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or any other person, shall be illegally upon any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, the management, or any employee

of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, may call to its assistance any policeman, constable, deputy sheriff, sheriff or other law enforcement officer of this state, and it shall be the duty of each member of the aforesaid classes of officers, upon request of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court management, or hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court employee, forthwith and forceably, if necessary, to immediately eject from such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, any such guest, or former guest, or other person, illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, as aforesaid.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1962

NO. 66

JAMES RUSSELL ROBINSON, JOSEPH PEACE PERKINS, MARVIN EDISON ROBINSON, THOMAS YAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE B. BUTLER, HENRY PRINGLE, REGINALD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY L. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT LANGER, JR.,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

RICHARD W. ERVIN
Attorney General

GEORGE R. GROSSETTA
Assistant Attorney General

Counsel for the Appellee.

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STATUTES

FLORIDA STATUTES:
Section 509.141 — 2, 3

IN THE

Supreme Court of The United States

OCTOBER TERM, 1962

NO. 748

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

-vs-

THE STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

Comes now the State of Florida, appellee in the above styled cause and in the interest of brevity, concedes that the appeal sought in this cause is from the opinion of the Supreme Court of Florida rendered on the 19th day of September, 1962, and reported in Florida, 144 So. 2d 811.

Appellee further concedes that the legislation involved and here under assault by this appeal is as represented by appellants, that is to say, **Section 509.141, Florida Statutes.**

Appellee accepts appellants' statement of the substantive facts and procedural steps set out in their jurisdictional statement at pages three through five only insofar as they reflect a true and correct resume of what the record in this cause would reveal. Appellee will make no changes therein except insofar as it may become necessary in its discussion post.

QUESTION PRESENTED

WHETHER SECTION 509.141, FLORIDA STATUTES, EITHER ON ITS FACE OR BY VIRTUE OF ITS APPLICATION TO APPELLANTS IN THIS CASE, CONSTITUTES A VIOLATION OF EITHER THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND A VIOLATION OF THE PRIVILEGES AND IMMUNITIES OF STATE AND FEDERAL CITIZENSHIP LIKEWISE ASSURED BY THE UNITED STATES CONSTITUTION.

JURISDICTION

Pursuant to the Revised Rules of this Court: specifically Rule 16 thereof, appellee moves to dismiss and/or affirm the appeal in this cause for the reason that even if the issue is as posed by appellants, it is manifest that said issue does not present a substantial federal question nor is the issue on which the decision of the cause depends one

of a substantial nature upon which this Court should pass.

Appellants would seek, by virtue of this Court's pronouncements in the case of **Shelley v. Kramer,** 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), to bring themselves within its protective pale. The logical progression by which they seek to align themselves therewith is at least arcane. Few, if indeed any among us would quarrel with the pronouncements of this Court in the **Kramer** case, supra. Virtually everyone however should stand ready to gainsay the application of the principles to be found therein to the case at bar. The **Kramer** decision, supra, was based upon the undeniable fact that a racial restrictive covenant was sought to be enforced by a party to said covenant who sought to enjoin the sale by another owner in a subdivision to a negro purchaser. By no stretch of the imagination could it be said that the rationale of that decision now compels a private restaurant keeper to contract to serve people in his establishment when to do so, in his opinion, would bring his establishment into disrepute, damage his business and perhaps ruin him insofar as future success (in any degree) were concerned. Moreover, the unequivocal proviso made a part of the restrictive covenant in the **Kramer** case, supra, was an open announcement to all those who became party thereto that any violation thereof would be condemned or enjoined with the aid of the state courts in that case. That is discrimination (for its own sake) based solely upon race or color such as has been, is being and, in all likelihood, will continue to be condemned by this tribunal.

However, when **Section 509.141,** supra, is placed in jux-

taposition with the restrictive covenant in the **Kramer** case, supra (however tortured its reading may be), one simply cannot find a reference to any ethnic, racial, religious, or color group as being the admitted or covert object thereof. In short, said legislation was passed to and does no more than operate across the board without regard to persons or their physical status *when in the opinion of the management of the enumerated establishments it would be considered detrimental to such establishments to continue to entertain them or their business on the premises.*

This may best be illustrated by a reasonable hypothetical, to-wit: suppose a group of unruly, white Anglo-Saxons whose presence could not be denied were to present themselves at this same establishment and demand to be served; suppose further that the same result obtained as did here, would such action be not equally subject to condemnation as a deprivation of equal protection as is that sought to be maintained here—we think that the answer thereto must be an unqualified "no." Who could, in good conscience, quarrel with the unbridled right of the management to request their departure and seek to buttress that request with whatever law enforcement was necessary in the circumstances? His quality judgment in that circumstance is in nowise different than that employed here. His action here was not any more discriminatory than would have been his action with reference to the threat posed to his business by these hypothetical parties.

Whatever view one may take of the moral and sociological reasons which many consider constitute a compelling reason to over-ride prejudice, it is simply not correct

to conclude that the wishes of any given individual must be preserved over the general right of other individuals to contract only as they see fit. That is all this legislation has ever sought to insure—that the enumerated principals of the legislation shall have a right under the aforesaid section to contract only as it suited them.

Adverting once again to **Kramer**, supra, we think it patently clear that but for the specific restrictive covenant, no disgruntled potential buyer; whatever his race, would have been heard to complain of a deprivation of any federally insured rights simply because property owners refused to sell to him on the basis of his race. So it is that the specific provisos of the restrictive covenant in **Kramer**, supra, were made the touchstone of this Court's rationale in ruling as it did therein. In comparison, since there is no mention whatever of any specific classes of people to whom this legislation is intended to apply, we consider that it follows as a matter of course that it had no such purpose as its object but rather to simply codify that which had long been a right enjoyed by the citizens of this and every other state, to-wit, to contract only as and when it suited their fancy. If it incidentally results in a refusal to contract with negroes because they are negroes, it is not to be condemned as racially discriminatory legislation. As a necessary corollary, we consider that it follows that if private business enterprises not engaged in interstate commerce always enjoyed the right to contract as they chose, then this legislation conferred no new rights in that regard. It further follows that their wish to enjoy rights admittedly theirs cannot and should not be thwarted by any individual who insists upon an alleged right (which has never been

his) to enter into a contract with someone without regard to whether that someone cares to so contract.

Certainly **Valle v. Stengle**, 176 F.2d 697 (1949), lends appellants no support inasmuch as the tickets to the Palisades Amusement Park (which was engaged in interstate commerce) had already been sold to the parties involved and they were later denied the right to exchange those tickets for swimming privileges—in direct violation of a New Jersey statute which forbade such action, to-wit: R.S. 10:1-2, N.J.S.A. In short, this was a condition based upon race alone sought to be implemented after the contract had been consumated, hardly the situation here. In the case at bar, it was simply a situation wherein the proprietors elected not to contract with the parties bringing this appeal. The State of Florida has not lent legal substance to their right to discriminate in contravention to the Fourteenth Amendment to the United States Constitution but rather upheld their undeniable right to contract only as and when they considered it to be in their best interest. Since the legislative codification pursuant to which these proprietors exercised the right which had long been theirs is not itself discriminatory in any way, it follows that their rights to freely contract may not be abridged by another's wish to insist upon a contract contrary to that right. It is for this reason that the Florida Supreme Court found it completely unnecessary to pass upon anything but the validity of the legislation in question. In finding as they did that it was not invalid, they were at least correct.

Nor does the case of **Marsh v. Alabama**, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946), pose any obstacle to the

correctness of the decision of the Florida Supreme Court. This is not a question of whether rights may be enjoyed on private property nor the state's indulgence of corporate bridling of fundamental liberties under the imprimature of state legislation, but rather the plain and simple judicial guarantee that one's right to contract shall never be made any more coerced by law than said individual's wish to contract—a guarantee that he shall never be duty-bound to contract with those whose offers do not satisfy him for any or no reasons.

Nor is this the situation which perhaps appeared in **Garner v. Louisiana**, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961). For aught that appears, it seems the licensing authority there involved sought to limit the use of the facilities in question on the basis of race—that was clearly state action calculated to deprive the omitted racial groups from privileges which apparently were extended to others not so situated. Here we have nothing bearing even any remote similarity thereto.

CONCLUSION

WHEREFORE, whether this Court views the matter in appellants' or appellee's light, it follows that, based upon the signal deficiencies to which we have adverted, the motion to dismiss should be granted, or, in the alternative, the action of the Florida Supreme Court should be affirmed.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General
Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Motion to Dismiss or Affirm in Response to Appellants' Jurisdictional Statement to the Honorable Tobias Simon, 233 Southeast First Street, Miami, Florida, counsel for the appellants, by mail, this ..... day of March, 1963.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1962

No. 748

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

INTRODUCTION

The opinion below, substantive facts and procedural steps, statute involved, and question presented in the

case at bar may be found in appellants' Jurisdictional Statement, pp. 1-5. Appellee's Motion does not deny the correctness of the foregoing items (pp. 1-2).

Although appellee's Motion is stated to be based on the lack of a substantial federal question in the instant case, appellee does not seek to demonstrate such lack but instead argues the merits of the case, relying on (1) the absence of racially discriminatory language in Florida Statutes, Sec. 509.141 and (2) individual "liberty of contract". Such reliance is totally misplaced.

APPELLANTS DO NOT ATTACK THE STATUTE INVOLVED ON ITS FACE BUT ITS **APPLICATION** IN THE CASE AT BAR IN VIOLATION OF APPELLANTS' RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE FEDERAL GUARANTEE OF PRIVILEGES AND IMMUNITIES OF STATE AND FEDERAL CITIZENSHIP.

It is undisputed that the Florida statute involved and the criminal information under which appellants were convicted proscribe refusal of restaurant guests to leave the premises after the manager or other person in charge so requests on the basis of his opinion that serving such guests would be "detrimental" to the restaurant. Nor is it disputed that in the case at bar the manager of the Shell City Restaurant had the "opinion" that serving appellants would be "detrimental" since the store's **admitted** policy was to serve Negroes in 18 of its 19 de-

partments but not in the 19th which is the Restaurant (R. 40, 50-53; Jurisdictional Statement p. 5). Thus the record is clear that appellants are attacking the constitutionality of the state statute here involved **as applied** in a racially discriminatory manner.

It should be noted that appellee's illustrative "reasonable hypothetical" on p. 4 of its Motion, involving "a group of **unruly**, white Anglo-Saxons" (emphasis supplied) convicted under Florida Statutes, Sec. 509.141, is in **no** way analagous to the instant case. Indeed, appellee does not question the accuracy of the following sentence in appellant's Jurisdictional Statement at p. 5: "The information does not charge, nor does the record contain any allegation or evidence that Appellants were boisterous, noisy or unruly or otherwise engaged in any disorderly conduct."

The racially discriminatory **application** of the state statute involved is obviously the gravamen to appellants' appeal to this Court.

WHETHER OR NOT A STATE VIOLATES THE CONSTITUTION IN ENFORCING A POLICY OF RACIAL DISCRIMINATION ON THE PART OF A PRIVATE RESTAURANT OTHERWISE OPEN TO THE GENERAL PUBLIC PRESENTS A SUBSTANTIAL FEDERAL QUESTION

It seems self-evident that the issue stated above does present a substantial federal question. Surely the issue of whether or not a Negro has the constitutional right to use public restaurants without state interference **on**

account of his race or color is of great significance at the present time. Suffice to say that appellee does not question the crucial nature of the issue but seeks to prove it has already been decided. Appellee's Motion, however, cites **no** authority for a negative answer to the question presented. Indeed, appellee limited its "argument" to an attempt to distinguish the cases cited by appellants.

Appellants here reiterate their contention that this Court's holdings in **Shelley v. Kraemer**, 334 US 1, 68 SCt 836, 92 LEd 1161 (1948), **Marsh v. Alabama**, 326 US 501, 66 SCt 276, 90 LEd 265 (1946), and **Garner v. Louisiana**, 368 US 157, 82 SCt 248, 7 LEd2d 207 (1961), lead to the conclusion that the Constitution of the United States does not permit a state, through its police officers and court system, to enforce a racially discriminatory policy of a private restaurant otherwise open to the general public. See also **Valle v. Stengle**, 176 F2d 697 (1949).

In the **Garner** case, **supra**, this Court reversed breach-of-the-peace convictions for lack of evidence and stated at 368 US 174, 82 SCt 257 as follows (emphasis added):

> " . . . for petitioners to sit peacefully in a place where custom decreed they should not sit . . . is not evidence of any crime **and cannot be so considered either by the police or by the courts.**"

Although Mr. Justice Douglas' concurring opinion states that private restaurants "are public facilities in which the states may not enforce a policy of racial segregation" (368 US 157, 82 SCt 248, 7 LEd2d 207), the majority of this Court specifically did not reach "the broader constitutional questions presented" in the **Garner** case. Such

questions are clearly presented in the case at bar. Moreover, the Florida statute herein applied **does** make "mere presence" a crime under the circumstances and is a criminal trespass statute (unlike the Louisiana statute as noted by Mr. Justices Frankfurter and Harlan in their separate opinions in the **Garner** case).

In addition, the instant case is analagous to several other "sit-in" cases now pending before this Court in which oral argument has been had.

Appellants submit that the federal question presented in the case at bar is clearly substantial.

CONCLUSION

For the foregoing reasons, appellants submit that appellee's Motion to dismiss or affirm should be denied and that the substantial federal questions here presented warrant plenary consideration by this Court.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, HOWARD W. DIXON, Counsel for appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on April ___, 1963, I served copies of the foregoing Brief in Opposition to Appellee's Motion to Dismiss or Affirm on the appellee, State of Florida, by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida, and by further mailing a copy thereof to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

BRIEF FOR THE APPELLANTS

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with the regulations promulgated thereunder, the State has, within the meaning of the *Burton* v. *Wilmington Parking Authority*, "so far insinuated itself into a position of interdependence" with restaurants "that it must be recognized as a joint participant in the challenged activity." 19

III The racial discrimination practiced by Shell's City is engendered by racial customs prevalent in Miami and throughout the State of Florida, and the pressures of state and local customs which were brought to bear upon the Appellants, necessarily constituted a denial by state action of Appellants' rights to the equal protection of the laws within the meaning of the Fourteenth Amendment. 27

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IN THE

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No. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of Florida is reported in 144 So. 2d 811. (R. 46) The opinion of the trial court, delivered orally at the conclusion of the trial, is set forth in the Record. (R. 36)

JURISDICTION

The State of Florida filed a criminal information against Appellants on August 17, 1960, pursuant to Florida Statutes § 509.141. (R. 1) Appellants were tried and were found by the trial court to have violated said statute and judgments were entered against them on August 26, 1960. (R. 36, 37) Appellants filed a Notice of Appeal to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida, on September 21, 1960 (R. 8), and the judgments of the trial court were ultimately affirmed by the Supreme Court of Florida in its Order and Opinion filed September 19, 1962. (R. 46) Appellants filed their Jurisdictional Statement herein on January 16, 1963, and this Court entered its Order Noting Probable Jurisdiction on June 10, 1963.

Jurisdiction of this Appeal is invoked pursuant to 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Where a group of Negroes and white persons in association with Negroes remain in a restaurant after the manager has refused to serve them and has requested them to leave the premises; and where the manager's refusal to serve and his request to leave are based upon the fact that the group comprises Negroes and white persons in association with Negroes; and where the police, at the manager's request, arrest the group because of their refusal to comply with the manager's request to leave the premises; are the arrests and subsequent convictions of the group for alleged violations of Florida Statutes § 509.141 in violation of the equal protection of the laws

guaranteed by the Fourteenth Amendment to the Federal Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. § 1 of the Fourteenth Amendment to the Federal Constitution.

2. R. S. § 1977 (42 U.S.C.A. § 1981), which provides that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

3. § 2 of the Declaration of Rights of the Florida Constitution, which provides that: "All political power is inherent in the people."

4. The following Sections of Chapter 509 of the Florida Statutes, which are set forth in full in the Appendix hereto: § 509.012; § 509.032(1); § 509.092; § 509.141; § 509.211; § 509.221; § 509.241; § 509.261; § 509.271; and § 509.291 (App. 6-25).

5. Florida Statutes §§ 352.03-353.18; 741.11-741.16; 798.04 and 798.05; and 950.05-950.08, set forth in full in the Appendix hereto. (App. 1-2; 26-31).

6. Florida Statutes § 948.01(1) and § 948.01(3), set forth in full in the Appendix hereto (App. 28).

STATEMENT OF THE CASE

The State of Florida filed an information against Appellants pursuant to Florida Statutes § 509.141(3), (App. 8) which charged that on August 17, 1960, they entered Shell's City Restaurant in Miami, Florida, seated themselves as guests at tables in the restaurant and unlawfully remained in the restaurant after having been requested by the management to leave, the management being of the opinion that if Appellants were served it would be detrimental to the restaurant. (R. 1 - 2) Trial was held in the Criminal Court of Record in and for Dade County, Florida, on August 26, 1960. Following the presentation of the State's case, Appellants moved for a judgment of acquittal, but their motion was denied. (R. 35) The Appellants presented no evidence. The trial court then entered judgments pursuant to Florida Statutes, Chapter 948 (App. 28), wherein it ordered that adjudications of guilt and the imposition of sentence be stayed, and placed Appellants on probation. (R. 36-37)

The record contains no conflict as to the material facts alleged in the information. The Appellants, comprising both colored and white persons, entered the restaurant and sat at several tables, and asked to be served. The manager refused to serve them, and called the police. A police officer arrived and the manager, accompanied by the officer, went to each table and again requested Appellants to leave, and they again refused. The police officer then advised them to leave and when they did not, he placed them under arrest. (R. 16, 17, 18, 23)

The manager stated that it was his opinion that the presence of Appellants was detrimental to his business for

the reason that they were Negroes and white persons in association with Negroes. (R. 22) The restaurant constitutes one of nineteen departments in the Shell's City department store, and the manager admitted that other patrons were being served in the restaurant at this time, and also admitted that it was not detrimental to the business for Negroes to purchase products in other parts of the store. (R. 23, 24) Although Negroes are invited to purchase in eighteen departments in the store, they are not allowed in the nineteenth, the restaurant. (R. 29)

A vice-president of the store stated that Shell's City's policy of not serving Negroes is based upon the customs, habits and traditions of the majority of the white people in the county and the state not to serve white and colored people seated in the same restaurant and that if Shell's City tried "to break that barrier", it "might have real trouble". (R. 29, 30)

SUMMARY OF ARGUMENT

The actions of the police and the courts of the State of Florida in evicting Appellants from the restaurant and in arresting and convicting them for alleged violations of Florida Statutes § 509.141 constituted state enforcement of racial discrimination and a denial of Appellants' rights to the equal protection of the laws guaranteed by the Fourteenth Amendment. Neither the State nor the restaurant owner can claim that the discrimination was purely "private" inasmuch as the arrests, prosecution and convictions were all effectuated by organs of state power. *Shelley* v. *Kraemer* and *Barrows* v. *Jackson*, *post*.

Further, since restaurants under Florida law are sub-

ject to the licensing, regulatory and supervisory authority of the Florida Hotel and Restaurant Commission, they operate as quasi-public instrumentalities of the State. Thus, the State has, within the meaning of *Burton* v. *Wilmington Parking Authority*, *post*, so far insinuated itself into a position of interdependence with restaurants that the discriminatory practices cannot be deemed so purely private as to fall outside the scope of the Fourteenth Amendment. Consequently, Shell's City has the affirmative constitutional obligation to serve the public without discriminations based upon race.

Finally, the discrimination practiced by Shell's City was the result of local racial customs, and the mass pressures of such customs, exerted by the people of Dade County and the State of Florida, thus coercing the restaurant to discriminate, constituted state action within the meaning of the Fourteenth Amendment and in violation thereof.

ARGUMENT

I

The participation by the police and courts below in arresting and convicting Appellants for alleged violation of Florida Statutes § 509.141, in aid of the restaurant's policy of racial discrimination, constituted state enforcement of racial discrimination and, consequently, a denial of Appellants' rights to the equal protection of the laws guaranteed by the Fourteenth Amendment.

1. In order to narrow and define the issues involved,

in this appeal, Appellants would first show to the Court that unlike other "sit-in" cases recently decided by the Court, (1) the issue here is not that of lack of evidence to support a conviction for disorderly conduct or unlawful assembly or the like, as in *Garner* v. *Louisiana*, 368 U.S. 157; 7 L.Ed.2d 207; 82 S.Ct. 248 (1961), and companion cases; (2) we are not here confronted with any statute, ordinance, or administrative policy expressly requiring racial segregation in restaurants, as in *Peterson* v. *City of Greenville*, and companion cases, 373 U.S. 244; 31 Law Week 4475 (1963); and (3) there is no assertion that the activities in question involve interstate commerce, as in *Boynton* v. *Virginia*, 364 U.S. 454; 5 L.Ed.2d 206; 81 S.Ct. 182 (1960).

2. Appellants rely first upon *Shelley* v. *Kraemer*, 334 U.S. 1, 22; 92 L.Ed. 1161, 1185; 68 S.Ct. 836 (1948), where the Court held that:

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of the equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

Accord: Barrows v. *Jackson*, 346 U.S. 249; 73 S.Ct. 1031; 97 L.Ed. 1586 (1953). Cf. *Hurd* v. *Hodge*, 334 U.S. 24; 92 L.Ed. 1187; 68 S.Ct. 847 (1948). In these cases, the Court refused to permit an arm of government to protect or give effect to a private party's asserted contractual property right, in the form of a restrictive covenant, where such

protection or assistance would have resulted in unlawful racial discrimination. In the case at bar Shell's City called upon the police of Miami to evict Appellants from the restaurant solely for the reason of racial discrimination. Thereupon the police in conjunction with the office of the State Attorney for Dade County, invoked the criminal jurisdiction of the Florida judiciary, and this aggregation of state authority succeeded in effectuating the restaurant's racial policy. Appellants, predicating their position upon *Shelley* and *Barrows*, submit that the Court should prohibit the public authorities of the State of Florida from lending their coercive power to protect or effectuate Shell's City alleged "property right" to refuse to serve patrons who are Negroes or in association with Negroes.

The State's position appears to be that the restaurant owner, as a "private party", has the unfettered right to select its customers and patrons by virtue of and in accordance with Florida Statutes § 509.141. (App. 8) Sub-section (1) of the statute authorizes the restaurant owner to remove or cause to be removed any guest "who, in the opinion of the management, is a person whom it would be detrimental to such . . . restaurant . . . for it any longer to entertain."[1] Sub-section (3) provides that any guest who shall remain in the restaurant after being requested to leave shall be guilty of a misdemeanor, and shall be deemed to be unlawfully within the restaurant. Sub-section (4) provides that the management may call any law enforce-

[1] A similar legislative assertion of the right to private choice is contained in Florida Statutes § 509.09, which provides that:

"Public lodging and public food service establishments are declared to be private enterprises and the owner or manager of public lodging and public food service establishments shall have the right to refuse accommodations or service to any person who is objectionable or undesirable to said owner or manager."

ment officer to its assistance, who shall forthwith eject such person from the premises.

§ 509.141 may be valid on its face, as it does not by its terms define race as a criterion of undesirability, and Appellants do not contest the State's right to assist a restaurateur in evicting patrons who refuse to leave where their undesirability is predicated upon appropriate reasons other than race. If a Negro were boisterous, intoxicated, or improperly attired, the restaurateur and the police would be justified in ejecting him, for these would be criteria of undesirability unrelated to the patron's race. However, the State's information did not charge, nor does the record contain, any allegations or evidence that any of the Appellants were unmannerly, or improperly attired, or engaged in any disorderly conduct. It is clear from the testimony of the managers that they considered Appellants undesirable and their presence detrimental to the restaurant's business for one reason alone, namely, that they were Negroes or persons in association with Negroes. Accordingly, it is Appellants' position that while the Statute may be valid on its face, the State invalidly applied it in the instant case by effectuating and enforcing racial discrimination. And the ruling of the Florida Supreme Court, below, in permitting the application of the statute in this case in effect authorized "discriminatory classification based exclusively on color." Stewart, J., concurring in *Burton* v. *Wilmington Parking Authority*, *post*, 365 U.S. 715, 727; 6 L.Ed.2d 45, 53.

The State's argument that the restaurant owner, as a "private party", has the right to select its customers, even on the basis of race, is sophistic. The entire transaction—from its inception, when the management requested Ap-

pellants to leave, to its conclusion, when the Appellants were convicted—was programmed and consummated pursuant to Florida Statutes § 509.141 and the statute was, in practical effect, applied to them solely because they are Negroes or were in association with Negroes. It is a sophistry to suggest that the discrimination was "private" when Appellants were arrested by police officers of the City of Miami, were incarcerated in a public jail awaiting trial, were prosecuted by the State Attorney's office, and were convicted of a criminal offense in a criminal court and under and by virtue of the criminal statutes of the State of Florida. The very participation of the office of the Attorney General of the State of Florida in this appeal further repudiates any notion that this is simply a "private" issue.

If, as in *Shelley* and *Barrows*, the civil sanctions of injunction and common law judgments are not available to one who would assert a property right for racial reasons, then *a fortiori* the exercise of the public power in the form of criminal sanctions should be prohibited. In the instant case the State injected itself into the restaurant owner's affairs to the extent of carrying out a mass arrest, staging a mass criminal trial and placing the Appellants in jeopardy of mass incarceration in the public jail. But for the issue of race, this entire drama would not have been enacted, and such blatant racial discrimination cannot be characterized as simply a private affair when this formidable arsenal of State power is brought to bear to enforce it.

The judgment below is also in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Valle* v. *Stengle*, 176 F.2d 697 (1949). Plaintiffs there brought suit under the Civil Rights Acts alleging a denial

of equal protection of the laws. Their complaint alleged that they were both Negroes and whites; and that the defendants, being the corporate owner of a private amusement park, the individual managers thereof, and the local chief of police, denied plaintiffs admission to the swimming pool therein and ejected them from the park on the ground that their party contained Negroes. In sustaining their complaint against a motion to dismiss the Court stated that:

> ". . . the plaintiffs were denied equal protection of the laws, within the purview of the Fourteenth Amendment because they were Negroes or acting in association with Negroes when they attempted to gain admission to the pool at Palisade Park. They, or some of them, were ejected from the park, were assaulted and were imprisoned falsely, as alleged in the complaint, because they were Negroes or were in association with Negroes, and were denied the right to make or enforce contracts, all within the purview of and prohibited by R. S. Section 1977". 176 F.2d 697, 702.

The Court held that the right to solicit contracts may not be violated by State action where such action is prompted by the fact that the soliciting parties are Negroes or persons acting in association with Negroes. Appellants here, like the plaintiffs in *Valle*, were denied the right to trade with Shell's City because of the fact that they are Negroes or persons in association with Negroes. R. S. § 1977, cited above, provides that:

> "All persons within the jurisdiction of the United States shall have the same right in every State

and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . . "

3. Concern has been voiced by some writers[2] that if the rule in *Shelley* and *Barrows* be extended to cases like the one at bar, then by further extension none could discriminate in their own homes against unwanted persons who happened to be Negroes, and that Negroes would thereby be accorded a special status as privileged trespassers. In reply, Appellants state first that it tortures the imagination to conceive of a hypothetical case coming to pass in which a private householder would invite the entire public, or a substantial segment of it, to enter his private premises on an otherwise indiscriminate basis, but refuse to admit Negroes and solely because of their race. Such a hypothetical case would involve not merely the right to turn a Negro away from one's door *under any circumstances;* rather, this special case must posit a householder inviting all persons similarly situated onto his premises, but excluding Negroes and solely because of their race. Such would indeed be a rare and extraordinary occurrence, but even if it should eventuate, its social significance would be trivial when compared with the wholesale discriminations in places of public accommodation which occur daily and in hundreds of communities throughout the country. It hardly needs repeating that racial discrimination by restaurants, which are otherwise open to the general public, constantly subject members of the Negro minority to public humiliation and indignities, and

[2]For a scholarly analysis of *Shelley*, its consequences, and its detractors, see Henkin, *"Shelley* v. *Kraemer*: Notes for a Revised Opinion", 110 U. of Pa. L.R. 473 (1962).

publicly proclaim them to be, in effect and *en masse*, inferior members of American society. Any such racial discrimination, as suggested above, by a private home-owner, while manifesting a pathetic prejudice, would be an isolated event and would not subject its victims to the notorious humiliation occasioned by restaurant discriminations; indeed, a Negro intruding upon the intimacy of a private home would hardly command serious social concern.[3]

Further, to argue the applicability *vel non* of *Shelley* and *Barrows* in the case at bar on the basis of the case of the hypothetical homeowner would be to argue *ignotum per ingnotius* and to lose touch with reality; the problem of the private home-owner should therefore not control the disposition of the actual case now before the Court. "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." Goldberg, J., concurring in *School District of Abington* v. *Schempp*, 374 U.S. 203; 31 Law Week 4683, 4715 (1963)

4. The circumstances in the case at bar are of critical immediacy and the application of the principle involved to places of public accommodation are of national importance. The Shell's City restaurant is located in a large department store, its business purpose is to serve the public, and it solicits the business of the public indiscriminately, except in one regard—that of race. "Access by the public is the very reason for its existence." Douglas, J., concurring in *Lombard* v. *Louisiana*, 373 U.S. 267; 31 Law Week 4476, 4478 (1963). The scope of the indignities and dis-

[3]Cf. Henkin, *op. cit.*, pp. 498, 499.

criminations which are practiced thus becomes a measure of their constitutional consequences. The issue, therefore, viewed realistically, is one of reconciling the restaurant owner's asserted proprietary rights with the constitutional guarantee of equal protection of the laws. Appellants contend that in this central issue that fundamental guarantee of racial equality should and must prevail over the asserted property right of private commercial choice. In choosing between similar conflicting claims of constitutional and equitable preferences, this Court has heretofore declared, in a related case, that the enforcement of restrictive racial covenants is not only violative of constitutional and statutory guarantees, but is "contrary to the public policy of the United States." *Hurd* v. *Hodge, supra*, 334 U.S. 24, 34; 92 L.Ed 1187, 1195. That same public policy should require an end to racial discrimination in restaurants. Indeed, that same public policy was dramatically manifested on August 2, 1963 when Ambassador Stevenson announced to the Security Council of the United Nations that our government would end the sale of military equipment to the Union of South Africa by the end of 1963, because of "the evil business of apartheid". Ambassador Stevenson, in referring to the many manifestations of apartheid in South Africa, including segregation in public accommodations, declared that "such indignities are an anachronism that no progressive society can tolerate, and the last vestige must be abolished with all possible speed."[4] With our public policy thus nobly proclaimed to the rest of the world, it is inconceivable that, where the choice is before us, we could assume a posture any less noble within our own nation.

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[4] *The New York Times*, August 3, 1963, p. 6.

5. The State begs the question when it asserts that the restaurant owner has the "right" to select his customers on the basis of race. First, such "rights" as he may possess and which are legally enforceable, derive their operable force from the State, and the participation of the State in this situation has already been discussed at length. Second, the private use of private property has at common law always been subject to a variety of judge-made restrictions, and thus the hoary maxim, *sic utere tuo, ut alienum non laedas*. In further illustration, it is a commonplace of the common law that the use of one's property for a noxious purpose will subject one to civil liability for maintaining a nuisance, and will also justify the exercise of the State's police power to terminate or control that use, cf. *Commonwealth* v. *Alger*, 7 Cush. 53; 61 Mass. 53; and strict liability, regardless of care, follows from the maintenance on one's property of an extraordinary hazard, *Rylands* v. *Fletcher*, 1868, L. R. 3 H.L. 330, 338. Again, one cannot deprive the community of the alienable use of one's own property in violation of the judge-made rules against perpetuities and accumulations, and other examples of common law restrictions abound in the field of future interests. Indeed, as a principle of federal constitutional law, a municipality may affirmatively prohibit racial dismrimination by restaurants and provide criminal sanctions for violations, and without doing constitutional violence to the owners' asserted rights of liberty and property. *District of Columbia* v. *John R. Thompson Company, Inc.*, 346 U.S. 100; 97 L.Ed. 1480; 83 S.Ct. 1007 (1952).

As the Court said in *Nebbia* v. *New York*, 291 U.S. 502, 525; 78 L.Ed. 940, 948; 54 S.Ct. 505 (1934):

"Under our form of government the use of prop-

> erty and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise freedom of contract to work them harm."

A striking illustration of choice between conflicting *property* rights occurred in *Miller* v. *Schoene*, 276 U.S. 272; 72 L.Ed. 568; 48 S.Ct. 246 (1928), where the State of Virginia had ordered the destruction of ornamental cedar trees to prevent contamination of nearby apple orchards with cedar rust. In upholding the State's action, the Court said that:

> "When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." 276 U.S. 272, 279; 72 L.Ed. 568, 571.

In the case at bar, not merely property rights, but significant *human* rights are at stake. Appellants submit that the Court here can and should make the kind of accommodation between property rights and human rights as it made in *Marsh* v. *Alabama*, 326 U.S. 501, 539; 90 L.Ed. 265, 270; 66 S.Ct. 276 (1946), where the Court concluded that:

> "When we balance the Constitutional rights of owners of property against those of the people to

> enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."

Surely the right to racial equality, at this juncture of America's historical development, shares with the freedom of press and religion an equally elevated position in the hierarchy of preferred constitutional rights.

Such accommodations of conflicting constitutional pressures have, of course, characterized the Court's determinations in a variety of situations. Freedom of speech and assembly is typically weighed against an asserted clear and present danger. *Cantwell* v. *Connecticut*, 310 U.S. 296; 84 L.Ed. 1213; 60 S.Ct. 900 (1940). The command of religious disestablishment has been leavened to accommodate the needs of public safety. *Everson* v. *Board of Education*, 330 U.S. 1; 91 L.Ed. 711; 67 S.Ct. 504 (1947). The many meanings of procedural due process define and modify our criminal jurisprudence in a system of ordered liberty. *Palko* v. *Connecticut*, 302 U.S. 319; 82 L.Ed. 288; 58 S.Ct. 149 (1937). How far a state may go in regulating interstate commerce without unduly burdening it is a recurrent paradox. Cf. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761; 89 L.Ed. 1915; 65 S.Ct. 1515 (1945). And the reasonableness of classifications and discriminations under the equal protection clause itself has frequently required resolution by the Court. *McGowan* v. *Maryland*, 366 U.S. 420; 6 L.Ed.2d 393; 81 S.Ct. 1101 (1961).[5]

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[5]But of course only the most extraordinary circumstances, such as the exigencies of wartime security, can justify discrimination based on race. *Hirabayashi* v. *United States*, 320 U.S. 81; 87 L.Ed. 1774; 63 S. Ct. 1375 (1943).

In the instant case the conflict between property rights and civil rights should and must be resolved against the use of state laws such as §509.141 which aid racial discrimination by restaurant owners. Moreover, such a resolution need not imply the assertion of any absolutist principles which would necessarily embarrass judicial flexibility where it may be needed in the future. As the Court said in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725; 6 L.Ed.2d 45, 52; 81 S.Ct. 856 (1961):

> " . . . respondent's prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account 'Differences in circumstances [which] beget appropriate differences in law,' Whitney v State Tax Com. 309 US 530, 542, 84 L ed 909, 915, 60 S Ct 635."

This same approach, in the area of religious disestablishment, is embodied in Mr. Justice Brennan's opinion in *School District of Abington* v. *Schempp, supra:*

> "These considerations bring me to a final contention of the school officials in these cases: that the invalidation of the exercises at bar permits this Court no alternative but to declare unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government. I cannot accept that contention. While it is not, of course, appropriate for this Court to decide questions not presently before it, I venture to suggest that religious exercises in the public schools present a unique problem. For not every involvement of religion in public life violates the

> Establishment Clause. Our decision in these cases does not clearly forecast anything about the constitutionality of other types of interdependence between religious and other public institutions." 31 Law Week, 4683, 4710.

Appellants offer, then, no startling novelty of the law, either in substance or approach. The precedents are bountiful, the approach is traditional. "There is here no seismic innovation. The edifice of justice stands, its symmetry to many, greater than before." Cardozo, J., in *Palko* v. *Connecticut*, 302 U.S. 319, 328; 82 L.Ed. 288, 294.

II.

Apart from the participation of the police and the state courts herein, the discriminatory action of Shell's City itself constituted state action, since by virtue of the Florida restaurant licensing law, Florida Statutes Chapter 509, together with the regulations promulgated thereunder, the State has, within the meaning of the BURTON v. WILMINGTON PARKING AUTHORITY, "so far insinuated itself into a position of interdependence" with restaurants "that it must be recognized as a joint participant in the challenged activity."

The Florida legislature has declared that the restaurant business is intimately affected with the public interest and Chapter 509 describes in great detail the public duties and responsibilities of the restaurants. The legislature has established the Florida Hotel and Restau-

rant Commission,[6] which has continuing regulatory supervision over "public food establishments", and the legislature requires that the Commissioner shall execute the laws governing their inspection and regulation "for the purpose of safeguarding the public health, safety, and welfare."[7] Having thus stated the public interest of the State of Florida in the restaurant business, Chapter 509 then proceeds to elaborate upon the details of its regulation. Thus, it requires approval by the Commissioner of the architect's plans for the erection or remodeling of any restaurant.[8] It regulates fire escapes, stairways and exits.[9] It regulates plumbing, lighting, heating, cooling and ventilation facilities.[10] It requires every restaurant to obtain a license as a "public food service establishment",[11] makes it a misdemeanor for such an establishment to operate without a license, and sets forth the procedure for revocation of such licenses.[12] It forbids a municipality or county from issuing any occupational license unless the Commissioner has first licensed the restaurant.[13] And it establishes an advisory council of private restaurants and hotels for the purpose of and "to suggest means of better protecting the health, welfare and safety of persons utilizing the services offered by the industries represented on the council."[14]

The statute pursuant to which Appellants were arrested, § 509.141, is an integral part of the above Chap-

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[6]Florida Statutes § 509.012 (App. 6).
[7]Florida Statutes § 509.032(1) (App. 7).
[8]Florida Statutes § 509.211(4) (App. 11).
[9]Florida Statutes § 509.211(1) (App. 10).
[10]Florida Statutes § 509.221 (App. 15).
[11]Florida Statutes § 509.241 (App. 18).
[12]Florida Statutes § 509.261 (App. 21).
[13]Florida Statutes § 509.271 (App. 24).
[14]Florida Statutes § 509.291 (App. 25).

ter and an integral part of this elaborate legislative schema and program encompassing "public food establishments."

In addition, extensive regulations have been promulgated by the Commissioner, prescribing in minute detail the health and safety measures by which every restaurant must abide. Florida Administrative Code, Chapters 175-1, 175-2 and 175-4. And it is especially important to note that the regulations are not concerned solely with health and safety measures, but in order to promote and safeguard the public welfare, also, *inter alia*, (1) provide that licenses may be issued only "to establishments operated, managed or controlled by persons of good moral character";[15] (2) prohibit publication or advertisement of false or misleading statements relating to food or beverages offered to the public on the premises;[16] and (3) provide that "achievement rating cards be conspicuously displayed".[17]

Moreover, Chapter 509 is obviously not designed merely to raise revenue or merely compel compliance with zoning ordinances, as in the case of the typical occupational licensing statute. And even though the grant of an occupational license as such may be a condition precedent

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[15]*Florida Administrative Code*, § 175-1.02. The 1963 session of the Florida Legislature further implemented the law by authorizing the Commission to revoke or suspend a license when "Any person interested in the operation of any such establishment, whether owner, agent, lessee, or manager, has been convicted within the past five years in this state or any other state or the United States of soliciting for prostitution, pandering, letting premises for prostitution, keeping a disorderly place, illegally dealing in narcotics, or any other crime involving moral turpitude." Chapter 63-63, Florida Statutes, § 509.261 (4)(a).

[16]Florida Administrative Code § 175-4.02.

[17]Florida Administrative Code § 175-1.03.

to engaging in the restaurant business, nevertheless, unlike the usual licensing requirements for merchants and tradesmen, Chapter 509 provides for the exercise of continuing administrative supervisory oversight and control, comparable to the supervision of businesses normally described as public utilities.

In addition, Shell City, Inc., *qua* corporation, exists only by virtue of state law, and is subject to the general Florida laws governing the creation, regulation, and dissolution of corporate entities. Florida Statutes, Chapter 608.

A restaurant, therefore, so linked to the state, and so involved in matters of obvious public concern, is a quasi-public instrumentality and cannot hide behind the gossamer defense of "private" action.

> "A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public . . . . Those who license enterprises for public use should not have under our Constitution the privilege to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny the equal protection of any group." Douglas, J., concurring in *Garner* v. *Louisiana*, 368 U.S. 157, 184, 185; 7 L.Ed.2d 207, 226.

And as Harlan, J., observed, dissenting in *The Civil Rights Cases*, with regard to state-licensed enterprises:

> "The authority to establish and maintain them

> comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public, to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be—which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude." 109 U.S. 3, 41; 27 L.Ed. 835, 849.

In *Burton* v. *Wilmington Parking Authority*, *supra*, the Delaware statute in question was not unlike Florida Statutes § 509.141, for it provided that:

> "No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business." 365 U.S. 715, 717; 6 L.Ed.2d 46, 47.

Notwithstanding this statutory provision, the Court concluded in *Burton* that the restaurant, because of its status as the city's lessee and because of its many other intimate involvements with the city, was not, even though privately owned, insulated from the scope of the Fourteenth Amendment.

Burton was, of course, only one of many instances in which the Court has held the action of an ostensibly private party to be, in constitutional contemplation, the act of the government. Thus in *Public Utilities Commission v. Pollak*, 343 U.S. 451; 96 L.Ed. 1068; 72 S.Ct. 813 (1952), the Court held that action of the Capital Transit Company constituted governmental action by virtue of its operating under the regulatory supervision of the Public Utilities Commission of the District of Columbia. To like effect was *Baldwin v. Morgan*, 287 F.2d 750 (5th Cir., 1961), where the Court of Appeals held that the Birmingham Terminal Company, albeit a private corporation, could not effect racial segregation in its waiting rooms, since the "terminal was admittedly a public utility holding itself out to serve all of the traveling public desiring to use the railroads operating through this station in Birmingham." 287 F.2d 750, 755. The Court added that:

> "When in the execution of that public function it is the instrument by which state policy is to be, and is, effectuated, activity which might otherwise be deemed private may become state action within the Fourteenth Amendment." 287 F.2d 750, 755.

Appellants submit that where racial discrimination is practiced, there should be no difference in constitutional consequences between such traditional "public utilities" as a transit company or a railroad terminal company, and a "public food service establishment" licensed and regulated under state law, for the extent of state involvement is no less significant in the latter case.

Moreover, the constitutional consequences of racial

discrimination by the restaurant should be no different than those determined by the Court in the case of the company town in *Marsh* v. *Alabama*, *supra*, where the Court stated that:

> "In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." 326 U.S. 501, 509; 90 L.Ed. 265, 270.

Appellants further contend that the discrimination by Shell's City was no more "an individual invasion of individual rights" than was the action of the Democratic Party in *Smith* v. *Allwright*, 321 U.S. 649; 88 L.Ed. 987; 64 S.Ct. 757 (1944), where the Court outlawed the Texas white primary and ruled that even though the Democratic party in Texas had been characterized as a "voluntary association" under Texas law, nevertheless, since the mechanics of the primary were prescribed in detail by State law and since the party performed duties imposed by State statutes, the duties it performed did not become matters of private law merely because performed by a "private political party". The Court stated that:

> "If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names

> appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment." 321 U.S. 649, 664; 88 L.Ed. 987, 997.

To like effect were the obligations imposed upon the "private" collective bargaining agent in *Steele* v. *Louisville & Nashville Railroad Company*, 323 U.S. 192; 89 L.Ed. 173; 65 S.Ct. 226 (1944).

Appellants submit that the interdependence of the restaurant and the State imposes a positive Constitutional duty upon the restaurant to respect the rights of all customers to be treated and served without regard to their race. Shell's City has nineteen departments in its emporium. It invites the entire public, white and colored alike, to buy its wares in eighteen of the departments, without discrimination. Only in the nineteenth, the restaurant, does it draw the line. Whatever may be its Constitutional obligations *vel non* to sell or not sell notions, hardware, clothing or the like to persons of color in the other eighteen departments, it clearly has the Constitutional obligation to refrain from racial discrimination in its restaurant.

If it be concluded that the majority in *The Civil Rights Cases* may have rejected Justice Harlan's view with respect to the effect of state licensing laws, then and to that extent Appellants pray that the Court no longer follow the majority's ruling. Indeed, the rulings of the Court in the subsequent cases of *Burton*, *Pollak*, and *Smith* v.

Allwright, above, depart from any such implications contained in Justice Bradley's opinion, and it would appear, therefore, that the Court need no longer be bound thereby.

III.

The racial discrimination practiced by Shell's City is engendered by racial customs prevalent in Miami and throughout the State of Florida, and the pressures of state and local customs which were brought to bear upon the Appellants, necessarily constituted a denial by state action of Appellants' rights to the equal protection of the laws within the meaning of the Fourteenth Amendment.

In *The Civil Rights Cases, supra*, the Court stated that:

> "civil rights such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of law, *customs*, or judicial or executive proceedings." 109 U.S. 1, 17; 27 L.Ed. 835, 841 (Emphasis supplied.)

The existence and force of such *customs* was made strikingly clear by one of the State's own witnesses in the case at bar. Mr. Warren C. Williams, vice-president of Shell's City, testified that the policy of Shell's City not to serve colored people is "based upon the customs, the habits and what we believe to be the desire of the majority of the white people of this county"; that "it goes back to what

is the custom, that is, the tradition of what is basically observed in Dade County would be the bottom of it"; that it is the customs and traditions and practice in this county—not only in this county but in this part of the state and elsewhere, not to serve whites and colored people seated in the same restaurant"; and that "if we went into a thing of trying to break that barrier, we might have racial trouble, which we don't want." (R. 29, 30)

Not only do these customs exist, but their underlying prejudices have been perpetuated and reinforced by a variety of enactments of the State of Florida which restrict the liberties of colored people and humiliate them as human beings. The Florida Constitution provides that white and colored children shall not be taught in the same school.[18] Separation of the races is required on railroads and in railroad waiting rooms.[19] Segregation of the races is required by county jails.[20] And marital and sexual congress between the races is prohibited and restricted with such elaborate reiteration as to suggest involvement in a paranoid ritual.[21]

But even apart from these enactments, "long-accepted customs and the habits of a people may generate 'law' as surely as a formal legislative declaration, and indeed, sometimes even in the face of it." Frankfurter, J., concurring in *Terry* v. *Adams*, 345 U.S. 461, 475; 97 L.Ed. 1152, 1163; 73 S.Ct. 809 (1953).

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[18]Florida Constitution, Article XII, § 12 (App. 1).
[19]Florida Statutes §§ 352.03-352.18 (App. 1-6).
[20]Florida Statutes §§ 950.05-950.08 (App. 30-31).
[21]Florida Constitution, Article XVI, § 24 (App. 1); Florida Statutes §§ 798.04; 798.05; 741.11-741.16 (App. 26-28).

And as Mr. Justice Douglas observed, concurring in *Garner* v. *Louisiana, supra:*

> "Though there may have been no State law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law." 368 U.S. 157, 181; 7 L.Ed.2d 207, 224.

It is Appellants' position that the word "state" as used in the Fourteenth Amendment need not be confined to the political representatives of the people, i.e., the executive, the legislature and the judiciary. Obviously, the people themselves can act politically and directly by constitutional enactment, and by such enactment, violate guarantees of the Federal Constitution. Thus, in *Neal* v. *Delaware*, 103 U.S. 370; 26 L.Ed. 567 (1881) the Court concluded that the Fifteenth Amendment nullified a provision of the constitution of Delaware which had purported to restrict the sufferage to white persons. Appellants submit that if action by the people themselves, as in the case of a constitutional enactment, amounts to state action, then action by the people themselves, even though not manifested in the legal formalism of a constitutional enactment, may likewise constitute state action where it is in the form of the mass pressure of customs and prejudices which coerce the individual private party into compliance.[22] In-

[22]And the "mental urges" behind the restaurant owner's decision to discriminate would be irrelevant. *Peterson* v. *Louisiana, supra,* 31 Law Week 4475, 4476.

deed, if the agents and delegates of the people—the legislators, the administrators and the judges—are restrained from effectuating racial discrimination, then it should follow *a fortiori*, and it would be a strange anomaly if it were otherwise, that the principal, namely the people themselves, should be subject to the same Federal Constitutional prohibitions. Section 2 of the Declaration of Rights of the Florida Constitution explicitly provides that "All political power is inherent in the people." Translated into the terms of the instant case, the people of the State of Florida, acting as the "state", compelled the restaurant owner to discriminate and thus the people of the state, constituting the "state", denied Appellants the equal protection of the laws.

CONCLUSION

For the foregoing reasons, Appellants pray the Court to reverse the judgments below and order that judgments of acquittal be entered as to all of the Appellants.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, ALFRED I. HOPKINS, counsel for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on August ___, 1963, I served copies of the foregoing Brief for the Appellants on the Appellee, STATE OF FLORIDA, by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida, and by further mailing a copy thereof to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

Alfred I. Hopkins

APPENDIX
TO BRIEF FOR THE APPELLANTS

Florida Constitution, Article XII, § 12 provides as follows:

> "White and colored children shall not be taught in the same school, but impartial provision shall be made for both."

Florida Constitution, Article XVI, § 24, provides as follows:

> "All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited."

Set forth below are the sections of the Florida Statutes cited in the foregoing brief:

352.03 First-class tickets and accommodations for negro persons.—All railroad companies doing business in this state shall sell to all respectable negro persons first-class tickets, on application, at the same rates that white persons are charged, and shall furnish and set apart for the use of such negro persons who purchase such first-class tickets a car or cars in each passenger train, as may be necessary, equally as good and provided with the same facility for comfort as shall or may be provided for whites using and traveling as passengers on first-class tickets.

No conductor or person in charge of any passenger train on any railroad shall suffer or permit any white person to ride, sit or travel, or to do any act or thing to insult or annoy any negro person who shall be sitting,

riding and traveling, in said car so set apart for the use of negro persons, nor shall he or they, while in charge of such train, suffer or permit any negro person, nor shall such person attempt to, ride, sit or travel in the car or cars set apart for the use of the white persons traveling as first-class passengers; but female colored nurses, having the care of children or sick persons, may ride and travel in such car.

352.04 **Separate accommodations for white and colored passengers.**—All railroad companies and other common carriers doing business in this state shall provide equal separate accommodations for white and colored passengers on railroads, and all white and colored passengers occupying passenger cars which are operated in this state by any railroad company or other common carrier are hereby required to occupy the respective cars, or divisions of cars, provided for them, so that the white passengers shall occupy only the cars or divisions of cars, provided for white passengers, and the colored passengers only the cars, or division of cars, provided for colored passengers; provided, that no railroad shall use divided cars for the separation of the races without the permission of the railroad commission, nor any car divided for that purpose in which the divisions are not permanent.

352.05 **Passenger occupying part of car set apart for opposite race; penalty.**—Any white person unlawfully and willfully occupying, as a passenger, any car or part of car not so set apart and provided for white passengers, and any colored passenger unlawfully and willfully occupying, as a passenger, any car or part of car not so set apart and provided for colored passengers, shall, upon conviction, be punished by a fine not exceeding five hundred dollars, or

imprisonment not exceeding six months. Nothing in this section shall apply to persons lawfully in charge of or under the charge of persons of the other race.

352.06 Penalty for violations §352.04.—If any railroad company or other common carrier shall violate any of the provisions of §352.04, or any rule, order or regulation prescribed by the railroad and public utilities commissioners under the authority of §350.20, such company or common carrier shall thereby incur for each such offense a penalty of not more than five hundred dollars, to be fixed, imposed and collected by said railroad and public utilities commissioners in the manner provided in §350.28.

352.07 Separate accommodations for white and negro passengers on electric cars.—All persons operating urban and suburban (or either) electric cars as common carriers of passengers in this state, shall furnish equal but separate accommodations for white and negro passengers on all cars so operated.

352.08 Method of division in electric cars.—The separate accommodations for white and negro passengers directed in §352.07 shall be by separate cars, fixed divisions, movable screens, or other method of division in the cars.

352.09 Divisions to be marked "For White" or "For Colored."—The car or division provided for white passengers shall be marked in plain letters in a conspicuous place, "For White," and the car or division provided for negro passengers shall be marked in plain letters in a conspicuous place, "For Colored."

352.10 Not to apply to nurses.—Nothing in §§352.07, 352.08, 352.09, 352.12, 352.13, 352.14, or 352.15 shall be so construed as to apply to nurses of one race attending children or invalids of the other race.

352.11 Operating extra cars for exclusive use of either race.—Sections 352.07-352.15 shall not be so construed as to prevent the running of special or extra cars, in addition to the regular schedule cars, for the exclusive accommodation of either white or negro passengers.

352.12 Separation of races; penalty.—Any person operating urban and suburban (or either) electric cars as common carriers of passengers in this state, failing, refusing or neglecting to make provisions for the separation of the white and negro passengers on such cars as required by law, shall, for each offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than five hundred dollars. This penalty may be enforced against the president, receiver, general manager, superintendent or other person operating such cars.

352.13 Duty of conductors; penalty.—The conductor or other person in charge of any such car shall see that each passenger is in the car or division furnished for the race to which such passenger belongs, and any conductor or other person in charge of such car who shall permit any passenger of one race to occupy a car or division provided for passengers of the other race, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding twenty-five dollars, or by imprisonment in the county jail for not exceeding sixty days.

352.14 Violation by passengers; conductor may arrest and eject; penalty.—Any passenger belonging to one race who willfully occupies or attempts to occupy any such car, or division thereof, provided for passengers of the other race, or who occupying such car or division thereof, refuses to leave the same when requested so to do by the conductor or other person in charge of such car, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding fifty dollars, or by imprisonment in the county jail for not exceeding three months. The conductor or other person in charge of such car is vested with full power and authority to arrest such passenger and to eject him or her from the car.

352.15. Each day of refusal separate offense.—Each day of refusal, failure or neglect to provide for the separation of the white and negro passengers as directed in this chapter shall constitute a separate and distinct offense.

352.16. Separate waiting rooms and ticket windows for white and negro passengers.—All railroad companies and terminal companies in this state shall provide separate waiting rooms and ticket windows of equal accommodation for white and colored passengers at all depots along lines of railway owned, controlled or operated by them, and at terminal passenger stations controlled and operated by them.

357.17 Penalty for refusal to comply with law or regulations.—If any railroad company or terminal company in this state shall refuse to comply with any provision of §352.16, or to comply with any rule, order or regu-

lation provided or prescribed by the railroad and public utilities commissioners under the authority of §350.21, such company shall thereby incur a penalty for each such offense of not more than five thousand dollars, to be fixed, imposed and collected by said railroad and public utilities commissioners in the manner provided by law.

352.18 Penalty for not providing separate cars for white and negro persons.—If any railroad company or any conductor or other employee thereof, or any person whatever, shall violate the provisions relating to the accommodation of white or negro passengers, he or they shall be punished by a fine not exceeding five hundred dollars, unless otherwise provided for.

If any railroad company shall fail to comply with said provisions of law the punishment herein prescribed may be inflicted upon the president, receiver, general manager or superintendent thereof, or upon each and every one of them.

509.012 Hotel and restaurant commission.—There is created a hotel and restaurant commission, for which the usual facilities for transacting its business shall be furnished the same as for other executive departments of the state government.

509.022 Appointment of hotel and restaurant commissioner; term of office; bond and salary.—The governor shall appoint a hotel and restaurant commissioner whose term of office shall begin and run concurrently with the regular terms of office of the successive governors of this state and who shall give bond in the sum of ten thousand dollars for the faithful performance of his duties, to

be approved by the governor. He shall receive a salary as provided in the general biennial appropriations act, or as hereafter provided by law, and shall be reimbursed for travel in connection with the duties of the office in accordance with the provisions of §112.061.

509.032 Duties.—

(1) GENERAL.—The hotel and restaurant commissioner shall carry out and execute all of the provisions of this chapter and all other laws now in force or which may hereafter be enacted relating to the inspection or regulation of public lodging and public food service establishments for the purpose of safeguarding the public health, safety and welfare. The commissioner shall be responsible for ascertaining that no establishment licensed by this commission shall engage in any misleading advertising or unethical practices as defined by this chapter and all other laws now in force or which may hereafter be enacted. He shall keep accurate account of all expenses arising out of the performance of his duties and shall file monthly itemized statements of such expenses with the comptroller, together with an account of all fees collected under the provisions of this chapter.

(2) SEMI-ANNUAL INSPECTION.—The hotel and restaurant commissioner shall inspect, or cause to be inspected, at least twice annually, every public lodging and food service establishment in this state, and for that purpose he shall have the right of entry and access to such establishments at any reasonable time.

(3) AUTHORIZED TO MAKE RULES.—The hotel and restaurant commissioner shall make such rules and

regulations as are necessary to carry out the provisions of this chapter in accordance with its true intent.

509.141 Ejection of undesirable guests; notice, procedure, etc.—

(1) The manager, assistant manager, desk clerk or other person in charge or in authority in any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall have the right to remove, cause to be removed, or eject from such hotel or apartment house, tourist camp, motor court, restaurant, rooming house or trailer court in the manner hereinafter provided, any guest of said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, who, while in said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises is intoxicated, immoral, profane, lewd, brawling, or who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court or such as to injure the reputation or dignity or standing of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or who, in the opinion of the management, is a person whom it would be detrimental to such hotel, apartment house, tourist camp, motor court, restaurant, rooming house, or trailer court for it any longer to entertain.

(2) The manager, assistant manager, desk clerk or other person in charge or in authority in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall first orally notify

such guest that the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court no longer desires to entertain him or her and request that such guest immediately depart from the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court. If such guest has paid in advance the hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall, at the time oral or written request to depart is made, tender to said guest the unused or unconsumed portion of such advance payment. Said hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court may, if its management so desires, deliver to such guest written notice in form as follows:

"You are hereby notified that this establishment no longer desires to entertain you as its guest and you are requested to leave at once and to remain after receipt of this notice is a misdemeanor under the laws of this state."

(3) And any guest who shall remain or attempt to remain in such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises.

(4) In case any such guest, or former guest, of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, or any other person, shall be illegally upon any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or

trailer court premises, the management, or any employee of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, may call to its assistance any policeman, constable, deputy sheriff, sheriff or other law enforcement officer of this state, and it shall be the duty of each member of the aforesaid classes of officers, upon request of such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court management, or hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court employee, forthwith and forceably, if necessary, to immediately eject from such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court, any such guest, or former guest, or other person, illegally upon such hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court premises, as aforesaid.

509.211 Safety regulations.—

(1) Every public lodging or public food service establishment shall have signs displayed in all hallways indicating all fire escapes, stairways and exits.

(2) Whenever it shall be proposed to erect a building three stories or more in height, intended for use as a public lodging establishment in this state, the owner, contractor or builder of such establishment shall construct said establishment so that one main hall, on each floor above the ground floor, shall extend to the outside wall at each end; or such main hall may turn at either or both ends, provided the distance from the main hall to the outside of the building, at any point, is no more than the depth of the room facing the outside of the building, and

provided further that the hall so turned shall extend to an exterior wall in which a door or window must be provided.

(3) No building of four or more stories in height shall be constructed for or converted for use as a public lodging establishment unless it be of noncombustible material or fireproof construction. This provision shall not apply to buildings now being used for such purposes.

(4) Before the erection or remodeling of any building for use as a public lodging or public food service establishment is begun, the registered architect's plans or registered engineer's plans, with detailed specifications, shall be approved by the supervising architect or engineer of the hotel and restaurant commission; all plans, specifications and drawings submitted for the purpose of securing building permits from any state, county or municipal building inspector, or other officer having like jurisdiction, shall bear the signature and seal of the architect or engineer and supervising architect or engineer of the hotel and restaurant commission before said building permit is issued; when such plans and specifications are submitted to the supervising architect or engineer of the hotel and restaurant commission for approval, they shall be accompanied by a remittance of an amount equal of the license fee prescribed for an establishment of such size in this chapter, provided that new construction or remodeling costing ten thousand dollars or less need not be accompanied by plans of a registered architect or engineer but scaled drawings shall be submitted to the hotel commission's architect or engineer for approval, as a condition precedent to securing a building permit.

(5) (a) Within sixty days after receipt of notice from the hotel and restaurant commissioner every public lodging establishment or public food service establishment in this state consisting of two stories in height must provide at least two means of exit, which shall consist of either fire escapes or stairways accessible to all occupants of the second floor which shall extend from the second floor to the ground or ground floor.

(b) Within sixty days after receipt of notice from the hotel and restaurant commissioner, every public lodging establishment or public food service establishment in the state consisting of more than two stories in height, shall be equipped with two means of exit, one of which shall be a complete fire escape consisting of iron, steel, concrete or other fireproof material, extending from the uppermost floor to the ground or ground floor and connecting with each floor above the ground floor by means of landings not less than six feet in length or four feet in width which shall be secured to the stirs not less than two feet in width with steps not less than six inches in tread with not more than a forty-five degree angle, such landing or stairs if constructed on the exterior of the building, to be guarded by an iron, steel, or concrete railing not less than thirty inches in height.

(c) Where, in the opinion of the supervising architect or engineer of the hotel and restaurant commission it is evident on inspection that strict compliance with the above two paragraphs, (a) and (b), regarding construction of second means of exit of buildings would in no substantial way increase or improve the safety of a building, the supervising architect or engineer shall suggest that the licensee appeal to a board made up of at least two

supervising architects or engineers and the commissioner for relief from the provisions of this section.

(d) Egress to all such fire escapes shall at all times be kept free and clear of all obstructions and doors leading to such fire escapes shall be constructed of fire resistant materials, equipped with automatic closing devices and panic bolts and such doors shall only open outward to fire escapes on the exterior of the building.

(e) Fire escapes installed inside any such building shall be constructed of fireproof material including walls, floors, ceiling, windows, casements, stairs, hand railings and doors and all other parts comprising same. All egress to inside fire escapes shall be guarded by doors with an automatic closing device, panic bolts and such doors shall only open toward the descent of the fire escape.

(f) All fire escapes shall be constructed, installed, and placed under the supervision of the hotel commissioner, who shall enact rules and regulations governing the same, which shall be in substantial conformity to the now existing code of national fire underwriters, relating to fire exits.

(g) All inside fire escapes shall be kept artifically lighted day and night by a circuit or means, separate and apart from the circuit or means providing for the general lighting of the said building.

(6) At every opening of a fire escape a red light shall be kept burning at all times and said light shall be connected to a circuit or means of lighting, separate and apart from the circuit or means providing for the general

ngnting of said building; there shall be posted and maintained in conspicuous places in each hall and in each guest room except in the hall or rooms on the ground floor of such buildings, plainly written notices reading "fire escapes are indicated by red lights."

(7) Every public lodging or food service establishment shall be provided with one fire extinguisher of a style and size approved by the national board of fire underwriters on each floor containing twenty-five hundred square feet or less of floor area, and one additional fire extinguisher on each floor for each twentyfive hundred square feet or less of additional floor space. Such extinguishers shall be placed in a convenient location in a public hallway outside of the sleeping rooms at or near the head of the stairs and shall always be in a condition for use.

(8) Each bedroom or apartment in each public lodging establishment shall be equipped with a good substantial lock and key on each door opening to the outside or to an adjoining room or apartment, or to a hallway.

(9) (a) The hotel and restaurant commissioner shall inspect or cause to be inspected by a competent engineer, every elevator used to carry passengers and freight, in public lodging and public food service establishments in this state, and when it is found that elevators are in an unsafe condition, the hotel commissioner shall require that such elevators be put in safe condition. Thereupon the owner, manager or lessee of the building or the party in charge thereof, wherein such elevators may be located, shall immediately repair and put such elevator or elevators in a safe condition.

(b) This section shall not apply to hotels, apartment houses, rooming houses or restaurants which now or hereafter maintain elevator service contracts or elevator public liability insurance; provided such public lodging and public food service establishments shall annually file with the hotel and restaurant commissioner a copy of an inspection report made under said service contract, or elevator insurance policy.

(10) All elevator shafts located in public lodging and public food service establishments in this state shall be of noncombustible material, and they shall be constructed in accordance with rules and regulations made and promulgated by the hotel commissioner.

509.221 Sanitary regulations.—

(1) In all cities, towns and villages where a system of waterworks is maintained for public use every public lodging establishment and public food service establishment therein operated shall, within sixty days after a receipt of notice from the hotel and restaurant commissioner, be equipped with suitable water closets or closets for the accommodation of its guests, and such water closets or closets shall be connected by proper plumbing with sewerage and means of flushing such water closets or closets with the water of said system, in such manner as to prevent sewer gas or effluvia from arising therefrom. Provided, that each hotel, rooming house and restaurant shall maintain not less than one toilet for each sex, properly designated; and provided that each hotel and rooming house shall maintain one public bath on each floor for every fifteen guests, or major fraction of that number, rooming on that floor not provided with private

or connecting bathrooms. Public baths shall not be required in hotels where each room is provided with bath.

(2) Every public lodging establishment and every public food service establishment shall be properly plumbed, lighted, heated, cooled or ventilated, and shall be conducted in every department with strict regard to the health, comfort, and safety of the guests or tenants; provided that such proper lighting shall be construed to apply to both daylight and artificial illumination, that such proper plumbing shall be constructed and plumbed according to proper sanitary principles, and that such proper ventilation, or cooling, shall be construed to mean at least one door and one window in each room.

(3) No room shall be used for a sleeping room which does not have an opening to the outside of the building, air shafts or courts. All operating windows in such rooms shall be properly screened and in each sleeping room there must be at least one window with opening so arranged as to provide easy access to the outside of building or courts.

(4) All hotels, rooming houses and restaurants in this state shall provide in the main public washroom clean towels for each guest; any standard commercial paper towels may be used; and in each bedroom furnish each guest with two clean individual towels so that no two or more guests will be required to use the same towel unless it has first been washed. Such individual towels shall not be less than ten inches wide and fifteen inches long after being washed.

(5) All hotels shall provide each bed, bunk or cot

or other sleeping place for the use of guests with pillow slips and under and top sheets of material containing 64 x 64 thread count or better; each sheet to be made ninety-nine inches long and of sufficient width to completely cover the mattress and springs; provided, that a sheet shall not be used which measures less than ninety inches after being laundered. Sheets and pillow slips after being used by one guest, must be washed and ironed before they are used by another guest, a clean set being furnished each succeeding guest.

(6) All bedding, including mattresses, quilts, blankets, pillows, sheets and comforts used in any hotel, apartment house, rooming house or restaurant in this state, must be thoroughly aired, disinfected and kept clean; provided, that no bedding, including mattresses, quilts, blankets, pillows, sheets or comforts shall be used which are worn out or are unfit for further use. No mattress on any bed in any hotel, apartment house, rooming house or restaurant shall be used which is made of moss, sea grass, excelsior, husks or shoddy. Any room in any hotel, apartment house, rooming house or restaurant infested with vermin or bedbugs shall be fumigated, disinfected and renovated until said vermin and bedbugs are exterminated.

(7) It is unlawful for any person to operate any place of business within the state where food is cooked or prepared without keeping all outside doors, windows and other similar openings of said place of preparation screened with wire netting of not less than sixteen mesh screening or protected by properly installed fans.

(8) The owner, tenant, operator or person in charge

of any public lodging establishment or public food service establishment shall keep all flies out of said place.

(9) No person suffering from any contagious or communicable disease shall be employed in any hotel, restaurant, apartment house or rooming house to prepare or handle food, drink, dishes, towels, or linens, or in any other capacity whereby such disease might be communicated to guests or tenants. All employees shall furnish health certificates including a Wassermann test, signed by a registered licensed physician of the state, whenever the hotel and restaurant commissioner or his deputy, in his discretion, deems it necessary for the protection of public health.

509.241 Licenses required; public lodging and food service establishments.—

(1) PUBLIC LODGING ESTABLISHMENTS; DEFINITION; LICENSES; EXCEPTION.—

(a) All buildings, groups of buildings, or other structures kept, used, maintained, advertised as, or held out to the public to be places where sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, and apartments, except as hereinafter exempted, are defined and shall be licensed as public lodging establishments. Any reference in the laws of Florida to hotels, motels, motor courts, apartment houses, rooming houses, or similar establishments shall be construed to mean a public lodging establishment as herein defined unless a different intent is clearly evident.

(b) The following are exempted from the provisions of paragraph (a) hereof:

1. All individually or collectively owned one, two, or three family dewelling houses or dwelling units and all of such houses or units which are not operated as a group, unless they are regularly rented to transients or held out to, or advertised to the public as places regularly rented to transients. For the purpose of this chapter transients are persons who are not legal residents of the community and who rent for periods of six months or less.

2. Dormitories and other living or sleeping facilities maintained by public or private schools, colleges, or universities primarily for the use of students, faculty or visitors.

3. All hospitals, nursing homes, sanitariums, and other similar places.

4. All places renting three rooms or less, unless they are advertised or held out to the public to be places that are regularly rented to transients.

(2) PUBLIC FOOD SERVICE ESTABLISHMENTS; DEFINITION; LICENSES; EXCEPTIONS.—

(a) Every building, vehicle, or other structure of similar purpose, or any rooms or divisions in a building, vehicle, or other structure of similar purpose, or any place whatsoever, that is maintained and operated as a place where food is regularly prepared, served or sold for immediate consumption on or in the vicinity of the premises is defined as, and shall be licensed as a public food service

establishment. This shall specifically include establishments preparing food to be called for or taken out by customers, to be delivered to factories, construction camps, airlines and other similar locations for consumption at any place. Any references to a restaurant in the laws of Florida shall be construed to mean a public food service establishment as herein defined unless a different intent is clearly evident.

(b) The following are exempted from the provisions of paragraph (a) hereof:

1. Places maintained and operated by public or private schools, colleges, or universities, primarily for the use of students and faculty.

2. Eating places maintained and operated by churches and religious or fraternal organizations primarily for the use of their members and associates.

3. Eating places located on airplanes, trains, buses, or watercraft which are common carriers.

4. Eating places maintained by hospitals, nursing homes, sanitariums and other similar places.

5. Theatres licensed under the provisions of §205.61, or any other license or occupational tax law enacted in lieu thereof, where the primary use is a theatre and patron service is limited to food items customarily served to the admittees of such theatres.

(3) LICENSES; ANNUAL RENEWALS.—For every establishment coming within the provisions of sub-

sections (1) and (2) of this section, the required license shall be obtained from the hotel and restaurant commissioner. Such license shall not be transferable, and it shall be a misdemeanor for such an establishment to operate without a license. The commissioner may refuse a license, or a renewal thereof, to any establishment that is not constructed and maintained in accordance with the law and rules and regulations of the hotel and restaurant commission. Licenses shall be renewed annually, and the commissioner shall adopt an appropriate regulation establishing a staggered schedule for license renewals which will avoid the necessity of all licenses being renewed on the same day of the year. Due regard shall be given in making the schedule to obtaining a relatively even distribution of license renewals coming due, and, thereby, to equalizing the work load of the commissioner's office staff.

(4) APPLICATION FOR LICENSE; PENALTY FOR FAILURE TO APPLY.—It shall be the duty of every individual who enters the public lodging or public food service business to make application for the licensing of his establishment prior to the commencement of operation. Failure to make application and payment of fee required within thirty days following commencement of operations or within thirty days following the expiration date of an existing license shall constitute a misdemeanor and shall be punishable as such.

509.261 Revocation or suspension of licenses; fines; procedure.—

(1) (a) The hotel and restaurant commision may suspend or revoke the license of any public lodging or public food service establishment that has operated or is

operating in violation of any of the provisions of this chapter or the rules and regulations promulgated by the hotel and restaurant commissioner relating thereto; such public lodging establishment or public food service establishment shall remain closed during the suspension or revocation of such license.

(b) Proceedings for the revocation of any such license shall be commenced by serving a copy of written notice. All notices to be served by the hotel and restaurant commissioner, provided for in this chapter, shall be delivered personally, or by a deputy commissioner, or by registered letter, to the owner, agent, lessee or manager of such building or premises, setting forth the facts constituting the alleged violation, the law or regulation alleged to have been violated, and the time and place of hearing thereon. Any such owner, agent, lessee, or manager shall at any such hearing have the right to cross-examine witnesses, produce witnesses in his defense and appear personally or by counsel. No such hearing shall be held within five days from date of service or mailing of notice unless the violation is of such a nature that extreme danger is imminent to the health, safety, or welfare of the people; then in such an event the hotel and restaurant commissioner may immediately suspend any such license, but in any such case, the owner, agent, lessee or manager shall upon request, be entitled to a hearing at a time and place fixed by the hotel and restaurant commissioner within three days from the date of suspension.

(c) Proceedings of the hotel commission may be reviewed by certiorari to the circuit court of the circuit in which such licensed establishment is located and ap-

peals from any decision of the circuit court may be taken to the supreme court of Florida in the same manner and subject to like conditions as appeals in chancery are taken.

(2) In lieu of the suspension or revocation of licenses, the commissioner, after complying with the procedural requirements prescribed by paragraph (b) thereof, may impose fines against licensees for violations of this chapter or rules and regulations relating thereto. No fine so imposed shall exceed five hundred dollars for each offense, and all amounts collected shall be deposited with the state treasurer to the credit of the general revenue fund.

(3) (a) No license shall be suspended under this section for a period of more than twelve months. Every revocation under this section shall be for one year. No new license shall be issued to the licensee or to any other firm or corporation in which the licensee or anyone of its stockholders are interested, during such suspension or revocation. Every public lodging establishment and public food service establishment, the license for which has been suspended or revoked under the provisions of this section, shall remain closed during such suspension or revocation.

(b) The hotel commissioner is hereby given full power and authority to suspend or revoke any license issued by him for the operation of any hotel, apartment house or rooming house or restaurant, whenever the owner, lessee, or manager, or any other person having exclusively or with others, either direct or indirect charge, control or management of such hotel, apartment house, rooming house, or restaurant, knowingly lets, leases or gives space or concession for gambling purposes or where

gambling is to be carried on, in any manner or by any means denounced by any statute of this state, in such hotel, apartment house, rooming house or restaurant or in or upon any premises which are used in connection with, and are under the same charge, control or management as, such hotel, apartment house, rooming house or restaurant. The suspension or revocation shall be of the license in effect at the date of such suspension or revocation, even though such license may be a renewal of the license which was in effect when the cause for such suspension or revocation arose, and even though it may have been issued to a licensee other than the person, firm or corporation who held the license at the time such cause for such suspension or revocation arose.

(c) Proceedings for suspension or revocation under this section, and for review of such proceedings, shall be in accordance with those provisions of §509.261, which govern proceedings for suspension and revocation for the causes specified in said section.

(d) Every proceeding for suspension or revocation under this section shall be commenced within sixty days after the cause for suspension or revocation specified in paragraph (a) hereof arises.

509.271 **Prerequisite for issuance of city or county occupational license.**—No municipality or county shall originally issue an occupational license to any business coming under the provisions of this chapter until a license has been procured for such business from the hotel and restaurant commissioner.

509.291 Advisory council; composition; purpose; meetings; duties; etc.—

(1) There shall be an advisory council of eight members composed of the president and executive officer of the following organizations: Florida restaurant association, inc., Florida hotel association, inc., Florida apartment house association, inc. and Florida motel or motor court association, inc. Other incorporated associations having similar interests and statewide membership may be represented on the council and shall be entitled to the same privileges upon making application and receiving the approval of the hotel and restaurant commissioner.

(2) The purpose of the advisory council is to promote better relations, understanding and cooperation between the industries represented on the council and between such industries and the hotel and restaurant commission; to suggest means of better protecting the health, welfare and safety of persons utilizing the services offered by the industries represented on the council; and to give the commissioner the benefit of its knowledge and experience concerning the industries and individual businesses affected by the laws, rules and regulations administered by the commissioner.

(3) (a) The advisory council may be called into session by the hotel and restaurant commissioner at his discretion, or it may call itself into session if a majority of the council agrees that a meeting is necessary.

(b) Regardless of whether a meeting is called by the commissioner or by the council, the council must hold

one regular meeting each year and may not hold more than one special meeting in each calendar month. All such meetings shall be held during one day.

(4) The members of the council shall receive no compensation for the performance of their duties hereunder, but the commissioner and the members of the council who are the presidents of their respective associations shall be reimbursed for travel expenses as provided in §112.061, when they attend a meeting called in conformity with the requirements of this section. The executive officers of the several associations shall not be reimbursed for travel expense incurred in attending such meetings.

741.11 **Marriages between white and negro persons prohibited.**—It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance.

741.12 **Penalty for intermarriage of white and negro persons.**—If any white man shall intermarry with a negro, or if any white woman shall intermarry with a negro, either or both parties to such marriage shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding one thousand dollars.

741.13 County judges not to issue licenses for white and negro intermarriages.—All county judges are prohibited from knowingly issuing a license to any person to intermarry against whom the disabilities in §741.11 specified may or do attach, under the penal sum of one thousand dollars, to be recovered by action of debt in any court of record having jurisdiction, for the use of the school fund.

741.14 Penalty for violation of §741.11.—If any county judge shall knowingly and willfully issue a marriage license for a white person to marry a negro, he shall be punished by imprisonment not exceeding two years, or by fine not exceeding one thousand dollars.

741.15 Marriage between white and negro persons not to be performed.—Any of the persons described in §741.07, who shall knowingly perform the ceremony of marriage between any persons who by the provisions of §741.11 are prohibited to intermarry shall in like manner forfeit and pay the penal sum of one thousand dollars, to be recovered in like manner as in §741.13 for the use of the school fund.

741.16 Penalty for marrying white and negro persons.—If any judge, justice of the peace, notary public or minister of the Gospel, clergyman, priest or any person authorized to solemnize the rites of matrimony, shall willfully and knowingly perform the ceremony of marriage for any white person with a negro, he shall be punished by imprisonment not exceeding one year, or by fine not exceeding one thousand dollars.

798.04 White persons and negroes living in adultery.

—If any white person and negro, or mulatto, shall live in adultery or fornication with each other, each shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding one thousand dollars.

798.05 **Negro man and white woman or white man and negro woman occupying same room.**—Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.

948.01 **When courts may place defendant on probation.**—

(1) Any court of the state having original jurisdiction of criminal actions, where the defendant in a criminal case has been found guilty by the verdict of a jury or has entered a plea of guilty or a plea of nolo contendere or has been found guilty by the court trying the case without a jury, except for an offense punishable by death, may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of such defendant.

(2) Prior to such hearing the court may refer the case to the parole commission for investigation and recommendation. The court, upon such reference, shall direct the commission and it shall be the duty of the commission to make an investigation and report in writing at a specified time to the court upon the circumstances of the offense, the criminal record, the social history, and

the present condition of defendant together with its recommendation.

(3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt and in either case stay and withhold the imposition of sentence upon such defendant, and shall place him upon probation under the supervision and control of the parole commission for the duration of such probation. And the said commission shall thereupon and thereafter, during the continuance of such probation, have the supervision and control of the defendant.

(4) In no case shall the imposition of sentence be suspended and the defendant thereupon placed on probation unless such defendant be placed under the custody of said parole commission except as provided in §949.03.

948.03 Terms and conditions of probation.—

(1) The court shall determine the terms and conditions of probation and may include among them the following: That the probationer shall (a) avoid injurious or vicious habits; (b) avoid persons or places of disreputable or harmful character; (c) report to the parole and probation supervisors as directed; (d) permit such supervisors to visit him at his home, or elsewhere; (e) work faithfully at suitable employment insofar as may be possible; (f) remain within a specified place; (g) make reparation or

restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court; (h) support his legal dependents to the best of his ability.

(2) The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it considers proper. The court may rescind or modify at any time of the terms and conditions theretofore imposed by the court upon the probationer.

950.05 Jails to be constructed so white and colored male and female prisoners may be separated.—The county commissioners of the respective counties of this state shall so arrange the jails of their respective counties that it shall be unnecessary to confine in said jails in the same room, cell or apartment white and negro prisoners, or male and female prisoners.

950.06 Unlawful for white and colored prisoners, male and female prisoners, to be confined together.—It is unlawful for white and negro prisoners to be confined in the county jails of this state in the same cell, room or apartment, or be so confined as to be permitted to commingle.

It is unlawful for male and female prisoners in said jails to be confined in the same cell, room or apartment, or be so confined as to be permitted to commingle, and the sheriffs of this state shall confine and separate all prisoners in their custody or charge in accordance with this chapter.

950.07 Appropriation authorized to remodel jail so classes of prisoners may be separated. — The county commissioners of the several counties of this state are authorized to appropriate from the general revenue fund of the said counties such moneys as are necessary to carry into effect the provisions of §§950.05-950.06.

950.08 Officers refusing to comply with law subject to removal.—Any board of county commissioners and any sheriff willfully refusing to carry out and comply with the provisions of §§950.05 and 950.06 in their respective spheres of duty shall be removed from office by the governor.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

—vs—

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF THE APPELLEE

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IN THE

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OCTOBER TERM, 1963

NO. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

—vs—

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF THE APPELLEE

OPINION BELOW

Appellee concedes that the pertinent opinion involved in this case is that to be found in 144 So. 2d 811.

JURISDICTION

Appellee concedes that appropriate jurisdiction to entertain this appeal is vested in this Court pursuant to 28 U.S.C. § 1257 (2).

QUESTION PRESENTED

Appellee concedes that the question as posed by appellants in their brief at pages 2 and 3 thereof is substantially in conformity with the issue upon which this Court is asked to rule.

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case as the same appears in their brief at pages 4 and 5 thereof only insofar as it reflects a true and correct resume of what the record below would, without conflict, reveal.

SUMMARY OF ARGUMENT

The constitutional sanctions imposed and the actions inhibited by the Fourteenth Amendment result from and are applied to only such action as may fairly be said to be that of the states, to-wit: "state action." The Fourteenth Amendment poses no constitutional barrier against mere private conduct, however morally disgraceful, reprehensibly discriminatory or internationally wrong. Private invasions or deprivations of individual rights have not been, are not now, and should not ever become the subject matter to which the constitutional sanction embodied in the Fourteenth Amendment directs itself. **Shelley v. Kraemer,** 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948); **The Civil Rights Cases,** 109 U.S. 3, 27 L.Ed. 835, 3 S.Ct. 18 (1883).

An individual who happens to be the owner of purely private property, such as the operator of a restaurant may, without colliding with the Fourteenth Amendment, discriminate as to invitees who might wend their way into his establishment, even if such discrimination be arbitrary. The same would, of course, apply, whether the establishment were owned by a partnership or a corporation or some other business association. The private property owner, whatever his status, has the right, even though he operates his private restaurant by license from the state or one of its political subdivisions, to select those persons with whom he wishes to deal and to base such selection on any or no reason, if he so desires. **Williams v. Howard Johnson's Restaurant**, 268 F.2d 845 (4th Cir.).

Appellee observes that no individuals are possessed of any constitutional right either to enter upon private property contrary to the will of the owner thereof or to remain thereon after having been asked to depart the premises. Conversely the private owner of the premises is and should ever be entitled to the protection of law enforcement (for which he pays heavily through taxation) as an aid to maintaining the peaceful possession of his property if and when it becomes necessary in order to preserve that which must be his and his alone under any law. This very Court, when making reference to certain state criminal trespass laws, stated in the case of **Martin v. Struthers**, 319 U.S. 141, 147, 87 L.Ed. 1313, 63 S.Ct. 862:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass

after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. . . "

Appellee contends that a state's general laws literally must be applied to all with equal force, regardless of their race, color, creed or previous condition of servitude and that any violations thereof cannot and should not be shielded from an attempt to apply such laws simply because the violators consider themselves insulated therefrom because of their race. The application and enforcement of Florida Statute, Section 509.141, which, in the circumstances of this case, made appellants trespassers after notice, within the contemplation of Chapter 821, Florida Statutes (Section 821.01), most assuredly cannot be considered a type of state action proscribed by the Fourteenth Amendment even though the owners only reason for requesting appellants to leave may have been because they were negroes. See **Griffin v. Collins**, 187 F.Supp. 149. The restaurant's business policy of not serving negroes in conjunction with whites in its facility was, despite the protestations to the contrary, neither induced, declared or required by any state or local law, policy or custom. Nor was it in any way knowingly or appreciably aided by action that could legitimately be said to be that of the state.

Appellants were arrested and convicted for a criminal trespass, no portion of which was based upon Florida's wish or intention to have this purely private restaurant operate as a segregated dispenser of prepared foods.

Local law enforcement had thrust upon it the lawful and appropriate duty upon complaint being made by the

restaurant owner to act in such a fashion as to protect said owner's rights and insure that appellants' unlawful refusal to leave the premises did not place said owner in the position of having to resort to "self-help" in defense of his inalienable right to people his establishment only with those who suited his fancy. In so doing Florida was merely allowing the use of a salutary legal remedy as a more welcome substitute for unbridled force in a civilized community. The state certainly was not inducing others to discriminate. It certainly was not countenancing discrimination based upon race. It certainly was not making any moral judgment as to the respective rights involved. It certainly was not substituting its judgment for that of the individual owner. It was simply attempting to keep the peace and, perhaps more important, to prevent the explosive situation which will one day surely come to pass if an individual's rights to enjoy his property cannot be as lawfully protected as appellants here suggest their alleged rights should be.

The restaurant in question, despite the fact that it was licensed under Florida law and in some measure regulated and/or supervised by the Florida Hotel and Restaurant Commission, did not then and does not now operate as a quasi-public instrumentality of the state. Such license and/or regulation is peculiarly limited to the general right of a government to supervise eating establishments for purposes of public health, safety and sanitation. Such regulation certainly does not cloak this or any other restaurant in Florida with an aspect of quasi-public function, interest or ownership.

Finally, whatever may have been the restaurant manager's view as to the local custom, appellee respectfully submits that segregation and/or racial discrimination in Greater Miami, Florida, while it well may be a historical fact, is not now and was not then a matter which even the most rabid of newspapers cared to explore. Therefore it is quite incorrect and in fact a superhuman stretch of the imagination to conclude that "state action" coerced this restaurant to discriminate against appellants within the meaning of the Fourteenth Amendment.

ARGUMENT

THE SUBSEQUENT PARTICIPATION BY THE POLICE AND COURTS BELOW IN ARRESTING AND CONVICTING APPELLANTS FOR VIOLATING SECTION 509.141, FLORIDA STATUTES, DID NOT CONSTITUTE STATE ENFORCEMENT OF LY, A DENIAL OF APPELLANTS' RIGHTS TO RACIAL DISCRIMINATION AND, CONSEQUENTTHE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.

With admirable candor appellants concede that here they do not assail their conviction on the theory that there was insufficient evidence to support their conviction as in the case of **Garner v. Louisiana**, 368 U.S. 157, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961). They likewise concede that the statute in question does not require racial segregation in restaurants as was the case of **Peterson v. City of Greenville**, 373 U.S. 244, 31 Law Week 4475 (1963). Terminally they concede that the issue of interstate commerce, as was in the

case of **Boynton v. Virginia**, 364 U.S. 454, 5 L.Ed.2d 206, 81 S.Ct. 182 (1960), is not here involved.

Appellee agrees that this is so.

At common law, a citizen engaged in or operating an enterprise with a public calling or flavor such as an innkeeper or common carrier was held to be under an unqualified duty to the general public and was obligated to serve, without discrimination, all who sought his service. It is, however, equally well settled that owners and/or operators of purely private enterprises, including, of course, restaurants, are under no such common law obligation; and, in the absence of any statute forbidding discrimination (as is the case in Florida) may select their invitees and/or clientele without regard to rhyme or reason and, if the Court please, based upon color if they so desire. **Williams v. Howard Johnson's Restaurant**, supra; **Slack v. Atlantic White Tower System, Inc.**, 181 F.Supp. 124, aff. 284 F.2d 746; **Griffin v. Collins**, supra; **Madden v. Queens County Jockey Club**, 72 N.E.2d 697 (New York), cert. denied, 332 U.S. 761; **Terrell Wells Swimming Pool v. Rodriquez**, 182 S.W.2d 824 (Texas); **Younger v. Judah**, 19 S.W. 1109 (Missouri); **Goff v. Savage**, 210 P. 374 (Washington); **De La Ysla v. Publix Theatres Corporation**, 26 P.2d 818 (Utah); **Horn v. Illinois Central Railroad**, 64 N.E. 2d 574 (Illinois); **Coleman v. Middlestaff**, 305 P.2d 1020 (California); **Fletcher v. Coney Island**, 136 N.E. 2d 344 (Ohio); **Alpaugh v. Wolverton**, 36 S.E. 2d 906 (Virginia); **Greenfeld v. Maryland Jockey Club**, 190 Md. 96; **Good Citizens Assoc. v. Board**, 217 Md. 129; **Drews v. State**, 224 Md. 186; **Garfine v. Mon-**

Monmouth Park Jockey Club, 148 A.2d 1 (N.J.); and **State v. Clyburn**, 101 S.E.2d 295 (N.C.).

Even this very Court in **Boynton v. Virginia**, supra, clearly recognized the applicability and validity of the foregoing principles when it concluded that every time a transstate bus stops at a wholly independent roadside restaurant not even the Interstate Commerce Act required that eatery to provide service in harmony with the provisions of that act. In point of fact this Court has even refused to hold that where a privately owned restaurant is invovled; in the absence of the general tax paying public's ownership of or interest in the facility, in interstate commerce that it will extend federal protection by judicial fiat against racial discrimination on the basis of the Fourteenth Amendment. **Burton v. Wilmington Parking Authority**, 365 U.S. 715, 6 L.Ed.2d 46, 81 S.Ct. 856 (1961); **Boynton v. Virginia**, supra.

Such recent pronouncements as these can certainly be considered no less than a judicial reaffirmance of the long-established law that the owner of private property may be arbitrary and capricious in his choice of invitees, not withstanding the Fourteenth Amendment; and that said amendment "erects no shield against merely private conduct, however discriminatory or wrongful." **Shelley v. Kraemer**, supra, and **Terminal Taxicab Company v. Kutz**, 241 U.S. 252.

In further accord with the aforesaid, it appears that appellants complain that it is inaccurate to state that this

was private action on the part of the restaurant owner but rather that it was in fact "state action" from its very inception. It seems that appellants might be willing to concede that even if the private owner had the right to exclude them from his premises solely on account of their race that the State of Florida invaded the area of forbidden conduct mapped by the Fourteenth Amendment when it arrested, prosecuted and convicted them under the statute in issue. This is, of course, further sought to be buttressed by the reference to the fact that the Attorney General is now appearing of counsel for the appellee. Lest there be any misunderstanding among the parties properly concerned in this case, the responsibilities of the Office of the Attorney General of the State of Florida, which include the mandatory representation of the state in all criminal appeals, may be found in Chapter 16, Florida Statutes. The provisions to be found in said chapter are legislative amplifications of the Constitution of the State of Florida relating to the Office of the Attorney General and his duties. See Article IV, Section 22, Florida Constitution.

A greatly similar if not in fact identical argument was advanced and rejected in the case of **Griffin v. Collins**, supra, the holding of the Court there being:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any

rights, privileges or immunities secured to the Negro by the Constitution or laws. **Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights.**" (Emphasis supplied)

Appellee concedes that "state action" which prompts, urges, suggests or advocates racial segregation both is and should be proscribed by the Fourteenth Amendment. However, appellee is just as quick to state categorically that Florida has never at any stage of these proceedings entered upon any "state action" much less that of the type which would coercibly, and hence unconstitutionally, be applied to enforce and abet racial discrimination simply by its act in arresting, prosecuting and convicting appellants in the circumstances of this case.

One fact must be borne in mind if all others are put aside, that is that the private decision to discriminate against appellants because of their race had already been terminally made by the manager of the restaurant and it was only upon appellants failure to leave that the police were asked to arrest them as violators under a valid legislative enactment, Section 509.141, supra. Would it not be folly to suggest that once having organized a system of legal redress and/or remedies, which system is presumed to be available to all citizens, that one such citizen seeking to enjoy his property in a manner which pleases him—albeit in opposition to the feelings of others, is not free to call upon this system in order that he might continue to enjoy rights

which are his? Must he take it upon himself to evict parties whom he does not want upon his premises and by so doing subject himself to all which may flow therefrom or is he free to call for aid upon the law enforcement which his taxes support and which he is urged to use when and if it becomes necessary in the course of events?

If the doctrine of "self-help" is to be his only alternative, then surely it would not be unconstitutional for a Florida legislative enactment to grant him and others so situated a valid defense to a charge which might arise from his wish to evict unwanted individuals. If the only way he can preserve his right is to do it himself, then it would be manifestly unfair to subject him to certain criminal prosecution stemming from his physical efforts to rid himself and his establishment of parties he does not wish to serve.

Is it not infinitely more correct and perforce compelling to note that all private choice must of necessity depend for its survival (if there is to be any) upon the majesty and rightful support of sovereign sanctions. Appellee considers this concept so clear and incapable of generating disagreement, that it would be a wonder to hear one voiced.

In this case the Greater Miami law enforcement which was importuned to keep the peace and, if necessary, to enforce the law, was, by so acting, totally color-blind. Not being shouldered with the responsibility of making a moral judgment which might one day be required to satisfy the protagonist of liberality, the arresting officer simply noted that after having been asked to leave by the proprietor

that appellants refused to comply with that request, whereupon they became violators of the law and as such the proper subjects of his power, nay duty to arrest for said violation.

Quite unlike the situation which might be said to have existed in **Griffin, et al. v. Maryland,** No. 6, Oct. Term, 1963, the State of Florida never delegated or attempted to delegate its authority to arrest a person who violated a valid state law.

The State of Florida here quite correctly confined its police authority to officers of the law acting independently of any connection with the wishes, motivations, orders or hopes of the restaurant—because of which they only intervened (for the very first time) after the restaurant's purely private decision to treat appellants as trespassers after notice and they had been asked to leave and had refused. While the ultimate effect, insofar as appellants are concerned might be said to be similar, we consider that it follows that the police action in arresting appellants in this case must be viewed as color-blind.

Whatever view one may take of the propriety of this Court's decision in the case of **Shelley v. Kraemer,** supra, it is at least incorrect to suggest, nay urge, that the pronouncements to be found therein control the situation here either totally or in part. The differences between the cases should be readily apparent—discrimination was **required** in the **Shelley** case, supra, and here is only the result of an individual's free choice unfettered by any state laws prohib-

iting it, any restrictive covenants, or any other legal or purportedly legal, like restrictions.

Also quite unlike **Valle v. Stengle**, 176 F.2d 697 (3rd Cir., 1949), we have here no state law such as that which was abridged by the amusement park in that case. Nor do we have an abridgment of a right to enforce contracts such as we did in **Shelley v. Kraemer**, supra, for here the management of the restaurant simply did not wish to contract with appellants.

Said another way, we pose this question: would this Court's decision in **Shelley v. Kraemer**, supra, have been the same if the property owner who had sought to convey his property to Shelley (as was actually the case) had refused to sell it to Shelley? We think the answer must of course be no. The inescapable reason therefor is that Shelley concerned the refusal, by state action of the Courts of Missouri to specifically require performance on the contract which had already been executed. Could it be said that this Court would have required a property owner among the group of covenantees in Shelley—they being independent owners thereof, to sell to anyone much less a negro if it did not suit them to do so. It is therefore not correct to say that the restaurant here is in the same position by virtue of the police arrest as was the Missouri Supreme Court in honoring the restrictive covenant which sought to unlawfully limit the scope of the covenantees in the disposition of their property.

This Court's decision in the **Shelley** case, supra, was not

a commandment that owners of property must sell to negroes without regard to their wishes. It was instead a commandment that once a property owner elects (of his own free will) to sell to a negro that the state cannot in any way marshall its forces so as to effectively denude the purchaser's right to have and enjoy that property.

Repeating, if this Court would not have required the seller in Shelley to in fact sell when he did not choose to, then how can it reasonably be urged that Shell City Restaurant here could be required to serve the negro if it did not choose to.

II.

SHELL CITY ACTION IN DECLINING TO SERVE APPELLANTS DID NOT CONSTITUTE SUCH STATE ACTION AS IS CONTEMPLATED BY THE FOURTEENTH AMENDMENT DESPITE THE FACT OF THE LICENSING LAW, CHAPTER 509, FLORIDA STATUTES, OR ANY REGULATIONS PROMULGATED THEREUNDER.

It is respectfully urged that Shell City's action in declining to serve appellants, even if based on race alone, was no more than private action wholly independent of any connection with the state, its laws, police or courts.

The mere fact that Chapter 509, Florida Statutes, addresses itself to the general area involving the licensing of restaurants in the State of Florida is no basis whatever upon which to conclude that in fact there is such inter-

dependence as to make Shell City's actions those of the state.

Carrying appellants' reliance upon the licensing provisions to its logical conclusion, would it not follow as a matter of course that simply because there is extensive legislation in Florida regulating motor vehicles and their use—the scope of which may be found between the pages of 4311 through 4328 in Volume 3, the index to Florida Statutes, 1961, that it would constitute state action if a state employee refused to accept a negro as a member of a car pool in the office?

Would it likewise not be true that simply because real estate brokers are extensively controlled by law in Florida—the scope of which may be found between pages 4457 through 4460 in Volume 3, the index to Florida Statutes, 1961, that it would constitute state action if a salesman or broker refused to sell a home or a plot of land to a negro? Would it further not follow simply because of the homestead exemption law—the scope of which may be found in Article X of the Florida Constitution and in Sections 192.113, 192.12, 192.13, 192.14, 192.141, 192.15, 192.16, 192.161, 192.17, 192.18, 192.19, 192.20, 192.201; 222.01, 222.02, 222.03, 222.05, 222.06, 222.08, 222.09, 222.10; 253.25, 253.35, 253.351, 253.352, 253.353, 253.354, 253.355, 253.356; 731.05 and 731.27, that an individual citizen of the State of Florida could not, without engendering state action that is, lawfully refuse a negro permission in his home.

While the answers to the above are obvious, appellants'

blithely skip over this by concluding that there is no need to speculate as to such matters in this case without giving any real reason therefor. Yet they do not hesitate to adopt as the rationale for a portion of their argument here the logic, an extension of which (see above) compels the same conclusion be reached with reference to the three areas specifically mentioned above. How convenient it would be, for appellants that is, if the logic could be cut off at their whim.

Adverting again to **Valle v. Stengle**, supra, it would seem that what appellants seek is not only the right to enforce contracts (see **Shelley v. Kraemer**, supra) once already formalized, but as well a guarantee that their wish, to contract will produce a like wish in an individual privately situated in a business house. They had in fact, at least in this case, the right to contract; that is to say, that they entered the premises and asked to be served. Their offer to spend their money in this restaurant was rejected by the proprietor because he did not wish to contract with them. This Court is now asked not only to enforce the contracts made the object of **Shelley v. Kraemer**, supra; not only to assure the right to contract made the object of **Valle v. Stengle**, supra, but now to act as judicial guarantors that a contract will be effected. If that be their wish, then one must wonder at the origin of their authority therefor.

Many years ago this Court rendered its opinion in **The Civil Rights Cases**, supra. In this decision the Court observed without qualification that the national Congress was

powerless to legislate against such private discrimination as may be said to be involved in the present case. This Court cannot (without overruling such prior precedents) accomplish the same result by now holding that the Fourteenth Amendment to the United States Constitution only now creates a new limitation and/or restriction upon the use of private property as has been developed for lo these many years. Would it not be odd to suggest that that which this Court found so offensive in the legislation made the object of its judicial condemnation in the civil right cases may now manifest itself in a judicial fiat (this Court's) not itself subject to the same approbation. It was the object of the legislation which this Court criticized in the civil rights cases at least as much as it was the attempt to legislate thereon. Just as surely would that be so here.

The mere fact that the restaurant was required to have a license in order to operate does not, as contended by appellants, prohibit discrimination by the private owner either as to its use or enjoyment; nor does the licensing requirement automatically work to convert such a private facility into a public one. See **Williams v. Howard Johnson's Restaurant**, supra; **Slack v. Atlantic White Tower System, Inc.**, supra; **Madden v. Queens County Jockey Club, Inc.**, supra; **State v. Clyburn**, supra. See also **Griffin v. Collins**, supra.

Ultimately appellants merely seek to impress upon this Court the need for a social adjustment so as to more nearly limn what some maintain should be our image—at least internationally. Intertwined within the entire argument

may be found a common thread, to-wit: not only should no such action (as here) result from either appellants' actions or others similarly inclined but that in fact the nation's future sit-ins should be free to operate under the imprimatur of a state blessing and in fact with state protection and encouragement—especially if they happen to be negroes. If this be so, it doth appear that the thrust of their argument descends to a claim that the right of an individual owner of a private business to determine who his customers will be is lost whenever his choice is based upon his disinclination to serve a particular racial group and that the ordinary trespass which (at least up until now) insured peaceful possession is nugatory when the owner's decision is based upon race. Would this Court assist appellants in their attempt to deprive the private property owner of his individual right to decide just who he shall have on his premises and by so doing, literally require him to fend for himself—when the members of a race with whom he does not wish to do business take the law into their own hands (on his private property) and intentionally commit a trespass thereon?

Morals had never had their origin in the law. Quite the contrary, the law was born of an assortment of moral codes and the law simply codifies such concepts. The initial murder was not bad because a court said it was bad but it ultimately became the object of prohibiting laws when a sufficient number of humans were morally revolted thereby. But there could be no judicial condemnation of murder even then without the law and its condemnation thereof.

Just as surely there could have been no legal condemnation without the moral force which prompted it. It well may be that one day man will not be cruel to his fellow man. It well may be that we will all one day walk in the image of God. It even may be that the day will come when the need for this or any other court will no longer exist. Whatever one's view may be of the aforesaid, it would appear to follow that until something less formidable than man's disinclination to be as moral as some would have him be looms upon the scene, man will be no better or worse than he ought to be. Just as prohibition failed miserably in its attempt to legislate morals so would a judicial condemnation here fail to make man moral when he chooses not to be.

Unlike the other cases which this Court will consider in conjunction with the instant case, there is here presented without any of the trappings to be found in those cases, the pure question of which individual's rights shall be paramount and why. Shall it be as appellants' contend, their right to be served wherever they please without regard or shall it be as the appellee contends, a right (theirs) to be so accommodated only if and when the individuals of whom they seek such accommodation are inclined to barter it away for money? We say again they cannot avail themselves of **Shelley v. Kraemer**, supra, to claim that they have a right to enforce something. Nor may they bottom their claim on **Valle v. Stengle**, supra, so as to urge that they have a right to contract. Instead, they seek to create a new right; nay a guarantee that when and if they, as individuals, choose to contract that the individuals with whom

they choose to contract no longer have any choice in the matter but must, by dint of this Court's law, accede to their wishes.

Viewed in such a light, and so it must be viewed, appellee must at once wonder at how appellants would consider themselves immune from the obvious result. That is to say that if we diminish the rights of one group of individuals in favor of those of another, then all suffer an irreplaceable loss as they (rights) would all become, at one time or another, nothing more than the whims of a given group at a given time.

CONCLUSION

Appellee, because of the foregoing reasons, urges the Court to affirm the action of the Florida Supreme Court as to all of the appellants.

Respectfully submitted,

RICHARD W. ERVIN.
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Appellee to the Honorables Alfred I. Hopkins, Tobias Simon and Howard W. Dixon, Counsel for the appellants, 223 Southeast First Street, Miami, Florida, by mail, this ..... day of September, 1963.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.

SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1963

No. 60

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Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

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Appellants,

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THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

Appellants reply to the State of Florida as follows:

1. The State's argument that it had no "intention" that the restaurant segregate ignores the obvious fact that

the very consequence of its activities—that of its police, its courts, and its prosecuting attorneys—was the enforcement of racial segregation. Further, the intentions and motives of the State authorities were wholly irrelevant in *Shelley* v. *Kraemer*, 334 U.S. 1; 92 L.Ed. 1161; 68 S. Ct. 836 (1948); and *Barrows* v. *Jackson*, 346 U.S. 249; 97 L.Ed. 1586; 73 S. Ct. 1031 (1953). And as the Court said in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725; 6 L.Ed. 2d 45, 52; 81 S. Ct. 856 (1961):

> " . . . no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

Moreover, any suggestion that the State acted simply as a "neutral" in these proceedings was completely negatived by the statement of the prosecuting attorney at the trial, who, objecting to a question as to whether Mr. McKelvey, Shell City's vice-president, had been asked to drop the charges, categorically asserted:

> "I am going to object to the second part. The State of Florida brought the action and not the witness. *He would not be in any position to drop the action.*" (R. 24) (Emphasis supplied)

2. The suggestion that the restaurateur would have a right of "self help" begs the question. While he may use reasonable force to evict a trespasser (6 Am. Jur. 20, Assault and Battery §§ 167, 168), nevertheless, such action assumes that the party evicted is unlawfully on the prop-

erty. However, the very issue here is whether, under the rule announced in *Shelley* and *Barrows*, Appellants were indeed unlawfully on the property. If they were not, then the use of "self help" by the restaurateur would subject him to liability for assault and battery, and this asserted right is thus rendered illusory. Further, if by virtue of *Burton v. Wilmington Parking Authority*, *supra*, *Public Utilities Commission* v. *Pollack*, 343 U.S. 451; 97 L.Ed. 1068; 72 S. Ct. 813 (1952); *Marsh* v. *Alabama*, 326 U.S. 501; 90 L.Ed. 265; 66 S. Ct. 265 (1946); and the other authorities cited in Part II of Appellants' Main Brief, the restaurant had the affirmative constitutional obligation to *serve* Appellants, then any notion of a right to "self help" would thereby evaporate.

3. The State's prediction of an "explosive situation" is the typical segregationist response in almost every civil rights case, and is an argument the Court rejected long ago in *Buchanan* v. *Warley*, 245 U.S. 60, 81; 62 L.Ed. 149, 163; 38 S. Ct. 16 (1918); rejected again, and in the face of the truly explosive situation in Little Rock, in the case of *Cooper* v. *Aaron*, 358 U.S. 1; 3 L.Ed. 2d 5; 78 S. Ct. 1401 (1958); and rejected again only last term in *Edwards* v. *South Carolina*, 372 U.S. 229; 31 Law Week 4225 (1963). Moreover, in the case at bar, there is no evidence whatsoever in the record of any violence or any attempted violence.

4. In Part II of their Main Brief Appellants set forth that they were not urging, and demonstrated that there are no compelling reasons to conclude, that the rule in *Shelley* and *Barrows* be extended to protect intrusions into a truly private situation, such as one's home, and the same reasoning applies to the argument set forth in Part

II of the Main Brief with respect to the effect of state licensing laws. Consequently, Appellee's references to car-pools and to the multitude of laws governing the homestead pose no obstacle to constitutional adjudication in favor of equal protection where the discrimination is practiced in places of truly public accommodation and which significantly affect patterns of community relations.

The State's appeal to "logic", therefore, is an appeal to a false logic, since it assumes a premise not suggested by Appellants. In *Burton* v. *Wilmington Parking Authority, supra*, the Court laid at rest any notion that the requirement of state action is necessarily predicated upon a rigid conceptualism. As the Court said:

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause in an impossible task which this Court has never attempted. [Citation]. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. 715, 722; 6 L.Ed. 2d 45, 50.

Compare in this regard Holmes, J. in *Hudson County Water Company* v. *McCarter*, 209 U.S. 349, 355; 52 L.Ed. 828, 832; 28 S. Ct. 529 (1908):

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side."

5. The State misreads *Valle* v. *Stengle*, 176 F. 2d 697 (3rd Cir., 1949), for the Court of Appeals decided the case on alternative grounds, concluding as it did that the complaint stated a cause of action under both Federal and State laws. Further, Appellants cite *Valle* simply for the proposition that the state may not interfere with the right to *solicit* a contract where such interference would effectuate private racial discrimination.

6. Appellee's argument that judicial condemnation of racial discrimination cannot affect traditional community attitudes, ignores the events of contemporary history. As a result of *Shelley* and *Barrows*, Negroes now live in neighborhoods where they were formerly regarded as pariahs. As a result of *Morgan* v. *Virginia*, 328 U.S. 373; 90 L.Ed. 1317; 55 S. Ct. 1050 (1946), *Henderson* v. *United States*, 339 U.S. 816; 94 L.Ed. 1302; 70 S. Ct. 843 (1950) and similar cases, racial segregation in public

transportation has practically disappeared. As a result of *Brown* v. *Board of Education*, 347 U.S. 483; 98 L.Ed. 873; 74 S. Ct. 686 (1954) and succeeding cases, hundreds of school districts throughout the South have desegregated or have begun to desegregate. And, following *Garner* v. *Louisiana*, 368 U.S. 157; 7 L.Ed. 2d 207; 82 S. Ct. 248 (1961) and companion cases, and *Peterson* v. *City of Greenville*, 373 U.S. 244; 31 Law Week 4475 (1963), and companion cases, restaurants, hotels and theaters, in hundreds of cities throughout the South now admit Negroes for the first time in history. The moral imperative of the Equal Protection Clause is, therefore, no mere fiction, and its salutary effects have been abundantly demonstrated.

7. Appellee's citations are, in the main, irrelevant, viz.:

(a) *Alpaugh* v. *Wolverton*, 36 S.E. 2d 906, did not deal with the issue of race.

(b) *Coleman* v. *Middlestaff*, 305 P. 2d 1020, held only that a dentist was not covered by California's public accommodation law.

(c) *Garfine* v. *Monmouth Park Jockey Club*, 148 A. 2d 1, stated specifically that the exclusion from the racetrack was not made on the basis of color.

(d) *Fletcher* v. *Coney Island*, 136 N.E. 2d 344, held simply that the Ohio Civil Rights Act, which created criminal penalties for racial discriminations, created no new equitable remedies.

(e) *Goff* v. *Savage*, 210 P. 374, dealt only with the question of whether racial discrimination by a drug store owner at his soda fountain constituted violation of a state statute, i.e., whether it was a place of public accommodation within the meaning of that statute.

(f) *Good Citizens Association* v. *Board*, 217 Md. 129, merely involved the propriety of action by the Board of Liquor Licenses Commissioners in granting a transfer of a liquor license to a new location.

(g) *Greenfield* v. *Maryland Jockey Club*, 190 Md. 96, did not involve racial discrimination.

(h) *Horn* v. *Illinois Central Railroad*, 64 N.E. 2d 574, again involved only a question of state law.

(i) *Madden* v. *Queens County Jockey Club*, 72 N.E. 2d 697, did not involve racial discrimination, and the court specifically stated that exclusion from the race-track could not be founded upon race or color.

(j) *Terminal Taxicab Company* v. *Kutz*, 241 U.S. 252; 60 L.Ed. 984; 36 S. Ct. 583, was concerned only with the jurisdiction of the Public Utilities Commission of the District of Columbia to fix rates for certain taxicabs.

The cases of *De La Ysla* v. *Publix Theaters Corp.*, 26 P. 2d 818; *Terrell Wells Swimming Pools* v. *Rodriguez*, 182 S.W. 2d 824; and *Younger* v. *Judah*, 19 S.W. 1109, all antedate *Shelley* and *Barrows* and other more recent pronouncements of the Court in the field of race relations. *Younger* v. *Judah*, *supra*, is in part, however, relevant to Appellants' argument in Part III of their Main Brief, for the court stated, with respect to the segregated facilities provided by the theatre owner, that:

"this rule adopted by him accords with the custom and usage prevailing in the state. *Such custom has the force and effect of law* until some competent legislative power shall establish some other and different rule." (Emphasis supplied) 19 S.W. 1109, 1111.

State v. *Clyburn*, 101 S.E. 2d 295; *Drews* v. *State*, 224 Md. 186; *Slack* v. *Atlantic White Tower System, Inc.*, 284 F. 2d 746 (4th Cir., 1960); *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir., 1959) and *Griffin* v. *Collins*, 187 F. Supp. 149 (D.C. Md., 1960), appear to agree in some measure with Appellee's position, but, not surprisingly, all expressed the response of jurisdictions located in the South. Appellants submit that, based upon their arguments herein and in their Main Brief, these cases were erroneously decided, and urge the Court to discredit them by its decision in the case at bar.

CONCLUSION

For the foregoing reasons Appellants reiterate the prayer for relief contained in their Main Brief.

Respectfully submitted,

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TOBIAS SIMON and
HOWARD W. DIXON
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223 S. E. First Street
Miami, Florida

By _____
Alfred I. Hopkins

CERTIFICATE OF MAILING

I, ALFRED I. HOPKINS, counsel for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on October_____, 1963, I served copies of the foregoing Appellants' Reply Brief on the Appellee, STATE OF FLORIDA, by mailing copies thereof to the office of RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida; to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida; and to RALPH S. SPRITZER, Esq., Assistant to the Solicitor General of the United States, Department of Justice, Washington, D. C.

_____

Alfred I. Hopkins

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IN THE

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Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' RESPONSE TO SUPPLEMENTAL BRIEF OF THE UNITED STATES

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IN THE

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THE STATE OF FLORIDA,

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On Appeal from the Supreme Court of the State of Florida

APPELLANTS' RESPONSE TO SUPPLEMENTAL BRIEF OF THE UNITED STATES

Appellants respond to the Government's *amicus curiae* brief in the following respects:

I.

In its brief the Government states:

> "We do not argue that Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment.
>
> * * *
>
> "Neither petitioners nor the United States is arguing that the Court should undertake to hold that places of public accommodation must serve all members of the public alike without regard to race or color."

These Appellants, however, have argued both in their brief on the merits and during oral argument that Shell's City had an affirmative obligation to *serve* Appellants and that its *refusal to serve* constituted a denial of the equal protection of the laws. Part II of Appellants' main brief is devoted to that proposition, and in the introduction thereto Appellants submitted that:

> "Apart from the participation of the police and the state courts herein, the discriminatory action of Shell's City itself constituted state action, since by virtue of the Florida restaurant licensing law, Florida Statutes Chapter 509, together with the regulations promulgated thereunder, the State has, within the meaning of the BURTON

v. WILMINGTON PARKING AUTHORITY, 'so far insinuated itself into a position of interdependence' with restaurants 'that it must be recognized as a joint participant in the challenged activity.'" (P. 19)

In *Burton* the very relief sought by the Negro plaintiff was an injunction against the lessee, Eagle Coffee Shoppe, Inc., to prohibit it from refusing to *serve* him on the ground of race alone. See the Chancellor's opinion in 150 A. 2d 197. Accordingly, and to the extent that Appellants' case is bottomed upon the holding and rationale of *Burton*, and because of the extensive involvement of the State of Florida herein through its supervision over restaurants by way of its licensing laws and regulations, Appellants submit that *complete* constitutional adjudication of this cause requires a holding that Shell's City, like Eagle, had a positive and affirmative constitutional obligation to serve the Appellants.

II.

The Government adverts, as did Appellants, to the concurring opinion in *Burton*, where Mr. Justice Stewart said that:

> "The highest court of Delaware has thus construed the legislative enactment as authorizing discriminatory classification based solely on color."

Not only is the position of the Florida Supreme Court no different here than was that of the Delaware Supreme Court in *Burton*, but the Attorney General of Florida has himself just publicly proclaimed the racially discriminatory effect of the Florida Statute in question. In response to

an inquiry from the County Attorney of Dade County, the Attorney General issued an opinion dated February 3, 1964 wherein he stated that:

> "This is in response to your letter of January 17, 1964, requesting the opinion of this office as to whether the Board of County Commissioners of Dade County have the power to prohibit discrimination upon the basis of race or creed by the owners and operators of public lodgings and public food service establishments and to prescribe penalty for the violation of such prohibition.
>
> **I concur with your conclusion that such legislation would conflict with Section 509.092, Florida Statutes, and would therefore be prohibited by Article IX, Section 11, Florida Constitution, as being in conflict with a general state statute,** *Dade County v. Mercury Radio Service, Inc.*, 134 So. 2d 791. The constitutionality of Chapter 509, Florida Statutes, has been challenged in the case of *Robinson et al v. State.* This case was argued before the United States Supreme Court in October of last year and a final decision is expected before the end of the present term of that court, which is June 1, 1964.
>
> In view of the fact that the United States Supreme Court will answer the question within the very near future finally deciding the issues before it, I will adhere to the established policy of my predecessors in office, of which you are familiar, and not render an opinion on the constitutionality of the statute when the matter is pres-

ently before the courts for final determination." (Emphasis supplied)

In view of this pronouncement, the State clearly cannot argue that the statute and the public authority are simply "neutral" in this contest. The statute, as thus construed by the Attorney General himself, clearly authorizes racial discrimination and as effectively as did the Delaware statute in *Burton*. Since the statute as thus construed *prohibits* the county from enacting a public accommodations law, and since it is the only provision of State law cited as inhibiting this exercise of municipal authority, it thus aligns the State on the side of racial discrimination and blocks any effort at remedial racial legislation by the local authorities. In *District of Columbia v. John R. Thompson Company, Inc.*, 346 U.S. 100, this Court upheld the constitutional authority of municipalities to enact anti-segregation ordinances as applied to places of public accommodation. The Florida statute, as construed by the Attorney General, expressly prohibits the exercise of such authority and, therefore, in all practical respects makes the State a partner to every act of racial discrimination in Florida restaurants.

Respectfully submitted,

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TOBIAS SIMON and
HOWARD W. DIXON
Counsel for Appellants
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Miami, Florida

By_____
Alfred I. Hopkins

CERTIFICATE OF MAILING

I, ALFRED I. HOPKINS, counsel for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on February _____, 1964, I served copies of the foregoing Appellants' Response to Supplemental Brief of the United States, by mailing a copy thereof in a duly addressed envelope with postage prepaid to HON. RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida; to HON. JAMES W. KYNES, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida; and to HON. ARCHIBALD COX, Solicitor General of the United States, Department of Justice, Washington, D. C.

_____

Alfred I. Hopkins

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IN THE

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OCTOBER TERM, 1963

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Appellants,

—vs—

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF THE APPELLEE IN REPLY TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

—vs—

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF THE APPELLEE IN REPLY TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE

PRELIMINARY STATEMENT

Appellee has no knowledge of the source of the questions argued in the supplemental brief for the United States as amicus curiae. Certainly they cannot be said

to have their origin in this Court's request that a supplemental brief be filed treating of the broader constitutional "question". Even indulging the solicitor in his right to at least a measure of literary latitude, it does seem that the issue upon which this Court requested their brief either is or shoud be as follows:

> MAY A PRIVATE CITIZEN WHO ELECTS TO SCREEN PERSONS WHOM HE WILL HAVE ON HIS PREMISES UPON THE ARBITRARY BASIS OF RACE ALONE CALL UPON POLICE OFFICERS TO ENFORCE THAT RIGHT?

This may be broken down into two (2) components without doing violence either to this Court's request or to the solicitor's brief.

> (A) DOES A PRIVATE CITIZEN HAVE THE RIGHT TO SCREEN PERSONS WHOM HE WILL HAVE ON HIS PREMISES UPON THE ARBITRARY BASIS OF RACE ALONE?
> (B) IF HE DOES, MAY HE CALL UPON POLICE OFFICERS TO ENFORCE THAT RIGHT?

Assuming, without deciding, that the question is properly stated and is capable of being correctly broken-down as set out above, the following observations seem, to the appellee, to be appropriate to this Court's reaching a conclusion anent the matter in issue.

ARGUMENT

Approximately eight-one (81) years ago this very tribunal in **The Civil Rights Cases,** 109 U.S. 3, 27 L.Ed. 835, 3 S. Ct. 18 (1883), observed; in condemning the legislative attempt of the National Congress, that private rights to discriminate could not be made the object of that legislative body's enactments.

Certainly it would be foolish to suggest that this Court would have made the pronouncement which it did if in fact there did not exist a private right to discriminate. The entire opinion in **The Civil Rights Cases,** supra, woud have no real meaning but for the salient difference between private discrimination and state discrimination.

It is manifestly well-settled that owners and/or operators of private enterprises including, of course, restaurants, are under no obligation to do business with any party simply because that party so wishes—they may select their invitees and/or clientele **sans** regard to rhyme or reason and, if the Court please, based upon color if that be their wish. **Williams v. Howard Johnson's Restaurant,** 268 F. 2d 845 (4th Cir.); **Slack v. Atlantic White Tower System, Inc.,** 181 F. Supp. 124, aff. 284 F. 2d 746; **Griffin v. Collins,** 187 F. Supp. 149; **Madden v. Queens County Jockey Club,** 72 N.E. 2d 697 (New York), cert. denied, 332 U.S. 761; **Terrell Wells Swimming Pool v. Rodriquez,** 182 S.W. 2d 824 (Texas); **Younger v. Judah,** 19 S.W. 1109 (Missouri); **Goff v. Savage,** 210 P. 374 (Washington); **De La Ysla v. Publix Theatres Corporation,** 26 P. 2d

818 (Utah); **Horn v. Illinois Central Railroad,** 64 N.E. 2d 574 (Illinois); **Coleman v. Middlestaff,** 305 P. 2d 1020 (California); **Fletcher v. Coney Island,** 136 N.E. 2d 344 (Ohio); **Alpaugh v. Wolverton,** 36 S.E. 2d 906 (Virginia); **Greenfeld v. Maryland Jockey Club,** 190 Md. 96; **Good Citizens Association v. Board,** 217 MD. 129; **Drews v. State,** 224 Md. 186; **Garfine v. Monmouth Park Jockey Club,** 148 A. 2d 1 (N.J.); and **State v. Clyburn,** 101 S.E. 2d 295 (N.C.).

Even this very Court in **Boyton v. Virginia,** 264 U.S. 454, 5 L.Ed. 2d 206, 81 S. Ct. 182 (1960), clearly recognized the applicability and validity of the foregoing principles when it concluded that every time a trans-state bus stops at a wholly independent roadside restaurant not even the Interstate Commerce Act required that eatery to provide service in harmony with its provisions. **In point of fact this Court has even refused to hold that where a privately owned restaurant is involved; in the absence of the general tax paying public's ownership of or interest in the facility, in interstate commerce that it will extend federal protection by judicial fiat against racial discrimination on the basis of the Fourteenth Amendment. Burton v. Wilmington Parking Authority,** 365 U.S. 715, 6 L. Ed. 2d. 46, 81 S. Ct. 856 (1961); **Boyton v. Virginia,** supra.

Such recent pronouncements as these can certainly be considered no less than a judicial reaffirmance of the long-established law that the owner of private property may be arbitrary and capricious in his choice of invitees, not withstanding the Fourteenth Amendment; and that said amendment "erects no shield

against merely private conduct, however discriminatory or wrongful." **Shelley v. Kraemer,** 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948), and **Terminal Taxicab Company v. Kutz,** 241 U.S. 252.

The net effect of the opinions in the cases cited above, is perhaps best stated in the case of **Griffin v. Collins,** supra, where the court said:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws."

In the face of these most compelling judicial acknowledgments of the existence of a private right to discriminate, appellee sadly notes multiple conclusions in the solicitor's brief that in fact such right does not exist and if it does, it should not. To the possible assertion that they only mean to say that the state should not encourage private discrimination, we would of course defer, if that were all. But, it is not.

The positions assumed in the solicitor's brief virtually require a series of impossible conclusions some of which may be summed up as follows:

That the establishment in this case (Shell City Restaurant) is as public as the streets of a city, its parks, sidewalks, structures and other thoroughfares.

Because it is an establishment of this nature, it is not to be considered in the same light as would be the right of an individual to select the people whom he will permit to enter his home.

The source from which this grand conclusion sprang is one which all the legal maps in the world could not help to locate. A private business man merely announces to the public that they are invited to deal with him in his establishment. He gives no assurances that he will deal with them, however contrary his past performances might lead one to believe. He may throw them all out if it suits his fancy or deny entry to those whom he pleases. That is basic contract law which even the most militant of advocates would not gainsay.

The streets of a city are owned by every resident—through the tax structure by which he must abide.

The parks of a city are owned by every resident—through the tax structure by which he must abide.

The sidewalks of a city are owned by every resident—through the tax structure by which he must abide.

The structures and thoroughfares of a city are owned by every resident—through the tax structure by which he must abide.

It is here that the solicitor elects to depart from the above and, sweeping it aside as though it were naught, replaces it with a cavalier announcement that because some members of the body public have literally never had to deal with such a proprietor, it is absurd to say that it is not public. The distinction should be obvious; while the private businessman garners his customers from the general public, he does not, simply because of that, surrender his right not to do business with any individual for any reason that may suit him. We think it axiomatic that one's private right in this regard has been held inviolate for all these years because to hold otherwise would be to destroy the very structure of our republic. If we are to pride ourselves on the net result of private endeavor, would it not be folly to suggest that the private endeavor, if it ever existed, should now be forever intered? We think so.

The solicitor seeks to buttress his conclusion that this was not simply private discrimination but rather state discrimination because even if it was in a measure private, it was engendered by a long policy of the State of Florida, which policy actively sponsored and encouraged such action either by legislative enactments or, of all things, community sentiment. The solicitor even reaches into the dim recesses of the past as though to find there what he knows he cannot find here.

We note that of all the cases relied on by the solicitor in support of his position only that of **Shelley v. Krae-**

mer, supra, bears even a remote connection with the issue at hand. Appellee notes now as it did in its initial brief on the merits of this case that the salient factor in Shelley was that the courts of Missouri were the implementing factor in judicially requiring the discrimination in question. In short, this Court's decision in Shelley did no more than insure the purchaser that once he acquired lawful possession to the property in question, no state (court) action could, if based upon race alone, deprive him of his right to enjoy it. Certainly this Court's decision in no way concluded that the purchaser had a right to buy the property if the seller did not wish to sell it. So it appears that even Shelley lends appellants precious little if indeed any assistance.

We further invite this Court's attention to the now celebrated Girard case (**Pennsylvania v. Board of Trusts**, 353 U.S. 230, 1 L.ed. 2d 792, 77 S. Ct. 806, reh. den. 353 U.S. 989, 1 L.ed. 2d 1146, 77 S. Ct. 1281), wherein it struck down the private trust which trust was set up with the specific provision that negroes could not participate. Much, if not all of this Court's action was predicated upon the fact that the trust was administered by trustees who were intimately connected with government. Subsequent to that decision, Pennsylvania's state courts removed the city connected trustees and substituted private individuals, none of whom held public office or exercised state or municipal powers. **In Re Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844 (1958).

Terminally, an appeal to this Court was taken from said redistribution of trustees. That appeal was dismissed by this Court. **Pennsylvania v. Board of Trusts,** 357 U.S. 570, 2 L.ed. 2d 1546, 78 S. Ct. 1383, reh. den. 358 U.S. 858, 3 L.ed. 2d 92, 79 S. Ct. 14.

So it appears that even if it be conceded that Pennsylvania action in changing the trustees was a calculated move to permit segregation in administering the trust in question, this Court of needs had to recognize that lacking any state agents or involvement in the "effective" decision, that the removal of the trustees by the state court did not constitute "state action" such as is or should be condemned under the Fourteenth Amendment.

Is there anything in this case bearing any resemblance to the acts of the state courts of Pennsylvania? No. Yet, even if there were, it was no more than the processes of law and order used to punish criminal trespassers on private property after notice. They did not become trespassers because they were negroes; they were trespassers because the owner of that property asked them to leave and they declined; not once, but repeatedly even after being importuned to leave by the police officer who was subsequently called upon the scene. If this action be subject to condemnation as state sponsored segregation, then man's privacy will hereafter be referred to only historically.

Why does the solicitor consider it necessary to recite what is perhaps best described as a moral batting average of the long-dead Confederacy?

Can it possibly be that the citizens of these errant thirteen (13) are now to be singled out as the more proper recipients of this Court's approbation simply because of a history which many would now prefer to believe should be purged of its evils by an inundation of brotherly love? In point of fact, it appears from the solicitor's brief that this is almost precisely the rationale which he employs as the basis for his conclusion.

If in fact this be so, appellee begs to inquire, should this seemingly endless recitation of historical discriminatory excesses be now laundered in kind by one terminally massive dose of unequal treatment bearing this Court's imprimatur?

Let us consider just where such an argument or, more properly entreaty, would leave us in the case of the State of Alaska. Alaska's legislative history is, when compared to that of the states which made up the confederacy, antiseptic. Since Alaska is in fact so clinically pure, must it not follow that its private citizens may freely discriminate based upon race alone and in fact call upon the police to enforce that right? Of course this follows since they have no historical basis upon which any community sentiment could generate private discrimination. Nor do they have any stigma such as Florida's to live down before their citizens may enjoy rights denied those of Florida. Much the same argument could be advanced with regard to the State of Oklahoma and the view that the Caucasians take of the Indians there. This could be

repeated many times as to all states in which substantial minority groups live and which states have no history of discriminatory legislation.

If the solicitor's reply to this inquiry be "No", then we beg to inquire, would he now urge that no citizen has a right to call upon police to aid him in the task of removing criminal trespassers from his private property? If the answer to that be "yes", we then beg leave to inquire, are the citizens to be left to aid themselves? If the answer to this be "yes", we then beg leave to inquire, what means the solicitor's oft repeated statement in his brief that a state cannot even sit idly by and permits its citizens to exercise self-help to rid themselves and/or their property of such criminal invaders? We thus approach the absurd result of no right to deny service to negroes (based upon race alone) either with or without state aid.

But surely this cannot be since this very Court has many times judicially acknowledged that private discrimination does not collide with the provisions of the Fourteenth Amendment to the United States Constitution. Do we now depart from even that? We think not. Unless, of course, this Court stands ready to deny the fact that an admitted right of private discrimination must have as its **elan vital** the right to back it up. Shall that right be left to the citizen in a catch as catch can manner or shall it be properly the responsibility of the fully trained staffs of law enforcement for whom the citizen pays heavily in taxes? The answer should be clear to the most dedicated of pro-

ponents. It would indeed be hell modified only in a slight degree to measure the value of one's right to keep his private property as he chooses by his ability to wield a leaded billiard cue or, if the locale be rural, a hickory ax handle. We should like to think that the solicitor cannot honestly mean and this Court would not sincerely consider having such problems solved on the business end of a .38. Truncheons ought not to replace law and order.

Any decision by this Court along the lines suggested by the solicitor either totally or partially would, in the view of the appellee be **pro tanto** a failure of justice. What has been judicially denied Congress as a right can gain no greater stature simply because it would have its origin in the writings of this Court.

If the Fourteenth Amendment to the United States Constitution provided no proper vehicle for Congress to attempt to legislate morals, and it did not, as this Court observed in **The Civil Rights Cases**, supra, then it gains no sancity simply because another division of the governmental trinity is asked to somehow apply its force to a painful situation. This Court said "no" to Congress and should say "no" to the solicitor, however it must feel about the alleged moral injustices which are undoubtedly the basis for this complaint.

The solicitor is pointedly asking this Court to function as a citadel of social amelioration simply because pressure from militant groups makes that course seem proper. If this Court responds to such a plea, then to-

morrow or surely the day after, the far greater number of non-negroes in this Nation may themselves elect to demonstrate and pressure government officials; in turn seeking to force either Congress or this Court to reverse its position. We cannot speak for anyone save the State of Florida when we categorically state that we would prefer that this Court not be blackmailed or threatened into rendering a decision no matter who the proponents, how noble their cause or how vast their number. The near vacuum in which justice should be rendered is there for that reason; to insulate this Court from just such pressures.

We note a long recitation of cities in which racial demonstrations have been held over the past several years. This must be included in an attempt to put forth the idea that the course of such demonstrations is, as we have said, noble and that negroes should be given their full measure of equality. If giving them their full measure of equality serves to decimate the rights of all (including the negroes) to enjoy their private property, then we observe that such a victory would indeed be the most pyrrhic of all; not at all unlike burning the barn to rid it of rats.

It is further observed that with the present-day demonstrations by the school children in New York City that not even the most total attempt at integration will please these agitators. We do not have at our fingertips any answer to the problem, certainly not one which comes as readily as seems to come that of the solicitor. However, we need not have a solution

in order to be able to quickly determine that the destruction of our private citizens' rights to manage their property is a cure, far more terrifying than the illness itself.

Should the Court be moved by the solicitor's argument that the cause for which our negroes have often and long-demonstrated is an appropriate basis upon which to condemn the convictions in this case, we would suggest the turning of a judicial deaf ear thereto.

Let us assume that this Court were to conclude as suggested by the solicitor, that it is time to take into account the wishes of the negroes as evidenced by their extensive civil disobedience and judicially reward them according to their wishes, what reason would there be to deny the same to the overflow demonstrations that well might follow by the one hundred seventy-five million (175,000,000) Caucasians who make up the balance of this nation's population. Inasmuch as that seems to be one of the key bases upon which the solicitor blithely insists a reversal should follow, this Court's decision to so respond would literally be an open announcement that pressure groups of some magnitude and force can generate a peculiar brand of justice when it might otherwise not follow. How then would they turn aside the demand for judicial reappraisal which a massive white demonstration might itself sponsor?

When there is no law upon which this Court could legitimately base the conclusion advanced by the solitor, there is only opinion to which this Court can turn. Opinion should never be the basis upon which to found a judicial decree—however noble its purposes. Since we are not a government of men (the only possessors of opinion) but rather one of laws, let the law, if it exists or not, set the basis and the only basis, upon which to decide a case. Opinion, however intelligently formed and however based upon sometimes painful reminders of moral deficiencies, is not likely to ever reach the stature of law. It well may be the forerunner of tyranny.

That there is no law upon which the conclusions of the solicitor could honestly be based, is axiomatic else why the strained attempt to establish some mythical link between history and public pressure as the basis for finding a non-existent state action or a reason to condemn private rights which literally know no limits in history.

This Court should note in its conclusion such a deficiency and in so doing forever free itself of the mounting pressures that have lately sought to replace the law which it is charged to vouchsafe.

Appellee notes the interesting aside based upon a regulation of the Florida State Board of Health regarding bathroom facilities in restaurants. We further note that the solicitor considers the existence of this regulation itself more than sufficient basis upon

which the convictions in this case should be reversed. This is legal legerdemain at its best. Not even Merlin and his magic wand could have produced such a miracle. How the existence of such a regulation which, we observe, was never presented to any tribunal in this or any other case; can effect the outcome of this proceeding escapes the appellee.

But, even if legal alchemy could make gold of this base metal, we rightly inquire, what possible difference can this regulation make in this case? We have here no complaint that the appellants sought to use a bathroom facility reserved to whites nor do we have a busines proprietor catering to all races being prosecuted for not having separate facilities. This is not avoiding the question posed by this Court, it is an evasion of it by bringing up collateral matters which, in this proceeding, have no proper place. We can only add that this is one of the many unwarranted conclusions and historical alliterations in which the brief of amicus seems literally to abound. We know not where leads this lengthy discourse unless it be one final attempt to ask this Court to join in an unconstitutional attempt to make man love his brother. We are hopeful that the private citiezns' right to discriminate is as insulated from the mandates of the Fourteenth Amendment today as it was in 1883 when this Court struck down the attempt of Congress to commit a similar wrong. If that not be so, we wonder at why the present legislation (Civil Rights Bill) does not have as its implementing vehicle any of the provisions of the Fourteenth Amendment as we know it today.

CONCLUSION

Appellee, because of the foregoing reasons, urges the Court to affirm the action of the Florida Supreme Court as to all of the appellants.

Respectfully submitted,

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Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Appellee in Reply to the Supplemental Brief of the United States as amicus Curiae to the Honorable Archibald Cox, Solicitor General, United States Department of Justice, Washington, D. C. 20530 and to the Honorables Alfred I. Hopkins, Tobias Simon and Howard W. Dixon, Counsel for the Appellants, 223 Southeast First Street, Miami, Florida, by mail, this ——— day of March, 1964.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.